

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg  
. Chapter 11  
.   
MOTORS LIQUIDATION COMPANY, . (Jointly administered)  
et al., f/k/a GENERAL .  
MOTORS CORP., et al, . One Bowling Green  
. New York, NY 10004  
Debtors. .  
. Monday, June 27, 2016  
. 11:05 a.m.  
. . . . .

TRANSCRIPT OF (CC: DOC# 13634,13648) MOTION TO AUTHORIZE NOTICE  
OF MOTION BY GENERAL MOTORS LLC PURSUANT TO 11 U.S.C. 105  
AND 363 TO ENFORCE THE BANKRUPTCY COURT'S JULY 5, 2009 SALE  
ORDER AND INJUNCTION, AND THE RULINGS IN CONNECTION THEREWITH  
(VERONICA ALAINE FOX, CLAUDIA LEMUS, TAMMIE CHAPMAN AND  
CONSTANCE HAYNES-TIBBETTS)

**BEFORE THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY COURT JUDGE**

APPEARANCES:

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non-Ignition Switch  
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1 (Proceedings commence at 11:05 a.m.)

2 THE COURT: Please be seated. All right. We're here  
3 in Motors Liquidation Company, Number 09-50026. I have the  
4 list of appearances in front of me. Who's (indiscernible)?

5 Mr. Steinberg, are you arguing?

6 MR. STEINBERG: Good morning, Your Honor. Arthur  
7 Steinberg and my colleague, Scott Davidson, and some -- from  
8 General Motors, in-house Mark Riashi at this table on behalf of  
9 New General Motors.

10 THE COURT: Okay. I have the other appearances.  
11 Let's just begin. Did you all check in? I mean, I have a list  
12 in front of me.

13 MR. WEINTRAUB: Yes, Your Honor. I did. William  
14 Weintraub with Goodwin Procter.

15 THE COURT: That's fine.

16 MR. STEINBERG: Good morning, Your Honor. We filed a  
17 motion to enforce, which had originally involved four cases.  
18 One case was a state court case filed by Mr. Butler, which is  
19 the Fox case; and three of the cases, Chapman, Tibbetts, and  
20 Lemus, were filed by Mr. Turner. The Lemus case has been  
21 settled and so the only things before Your Honor in connection  
22 with this motion to enforce are Fox, Chapman, and Tibbetts.

23 Since the time that we filed the motions to enforce,  
24 there's been some movement of the parties, but not all the way  
25 there, in connection with resolving the motion to enforce. In



1 many cases, the plaintiffs re-pled their complaint.  
2 Occasionally they would move to strike a claim. Many times  
3 they tried to clean up the allegations when we showed them a  
4 marked complaint and why they were not compliant with Judge  
5 Gerber's December judgment. But we are at an impasse where we  
6 would need Your Honor to resolve.

7           Now, I think we had pointed out to Your Honor in a  
8 letter that we wrote the end of last week that we filed a  
9 second motion to enforce on Friday, which involves some of the  
10 common issues that are here and there's a return date of July  
11 18th on that motion to enforce. And we had said that the  
12 reason why we had singled out these cases to start the process  
13 was primarily because of the Fox case, which has a trial date  
14 in September, and we wanted to make sure that Your Honor had  
15 enough time to resolve the impasse for purposes of allowing  
16 that trial to go forward in a timely basis.

17           Since we filed the motion to enforce in the Fox case,  
18 there was one significant movement, which was that they dropped  
19 the punitive damage claim.

20           THE COURT: Yeah, I -- look, I've read the letters of  
21 June 23rd and June 24th from respective parties that deal with  
22 Fox. So at least in Mr. Davidson's June 24th letter, the issue  
23 with respect to Fox seem to be as to the independent claim,  
24 whether that was going to be removed, and I certainly read in  
25 the Butler letter -- unclear to me. It refers to "our



1 negotiations with GM continue," so I don't know what -- you  
2 know, here we are on June 27th, whether you've resolved that  
3 issue or not.

4 MR. STEINBERG: I don't think we have resolved the  
5 issue, although I would say that it would seem to me that the  
6 issues should be resolvable. Because the general thrust or the  
7 major issue in these cases where you have a post-closing  
8 accident which is not involving the ignition switch defect,  
9 which is defined as the first three recalls, is that they're  
10 not allowed to assert an independent claim and the only path  
11 for punitive damages in connection with a post-closing accident  
12 against New GM for an Old GM vehicle is if you had an ignition  
13 switch defect. So if you're not asserting punitive damages,  
14 then issues of your allegations and the types of claims you're  
15 asserting are not necessarily as critical as the punitive  
16 damage.

17 So once the punitive damage is dropped in Fox, then  
18 we're left with whether there's a New GM duty to warn which is  
19 different than the old GM duty to warn. And Judge Gerber  
20 decided, in his December judgment, that duty to warn could be  
21 an element of an assumed liability, of an assumed product  
22 liability. So that if you were going to assert a product  
23 liability case and you were going to assert the traditional  
24 causes of action that go with that like a strict liability,  
25 like negligence, that he is saying that if you also include



1 duty to warn as part of the assumed product liability, that is  
2 okay. But if you are asserting it as an assumed liability,  
3 you're not entitled to get punitive damages.

4 THE COURT: So let me -- obviously, Judge Gerber  
5 lived with this for a long time and I've only been living with  
6 it for a short time. So -- and I know the briefs talk about  
7 the (indiscernible). Bear with me a second. Okay? Grumman  
8 Olson, so I think your position in your -- Grumman Olson, I've  
9 read those decisions long before this matter landed on my  
10 calendar.

11 Your position is those really aren't relevant because  
12 New GM assumed liability for personal injury as part of the  
13 sale and Grumman Olson really deals with there was an effort  
14 not to have that liability.

15 MR. STEINBERG: I think there are six distinguishing  
16 features to Grumman Olson and if Your Honor would like me just  
17 to tick that off at this point, I can do that as well too. But  
18 I'll do it in my presentation.

19 THE COURT: That's fine.

20 MR. STEINBERG: The critical thing on all of these  
21 cases is are you asserting it as an assumed liability or are  
22 you trying to assert something as an independent claim as a  
23 vehicle owner without the ignition switch defect you're not  
24 allowed to assert an independent claim. And sometimes the  
25 issue is difficult because the duty to warn allegation is stuck



1 in the middle of what someone would think of is traditionally  
2 an assumed liability, so it's found in the negligence count.

3 In the Fox case, because of our dialogue, I think the  
4 Fox plaintiff says, all right, I'm going to break it out so you  
5 can see where it is and is as an independent claim. So with  
6 respect to Fox, our position is very simple, that as a post-  
7 closing accident plaintiff without the ignition switch defect,  
8 they cannot assert an independent claim. And if they think  
9 that that separate count is anything different than the Old GM  
10 duty to warn, then they're proscribed from doing that by virtue  
11 of the December judgment.

12 The Chapman case and the Tibbetts case present more  
13 stark issues because in Chapman, the two counts are strict  
14 liability and negligence. In the negligence count there's  
15 something called an asserted failure to identify a defect,  
16 which Judge Gerber found in the December judgment wasn't even  
17 an assumed liability; and the second was duty to warn. But the  
18 entire complaint for the two counts, strict liability and  
19 negligence, asked for punitive damages. So they are asking in  
20 the Chapman case for punitive damages on an account of an  
21 assumed liability, as well as to the extent that they think  
22 that they can assert an independent claim, whatever those  
23 independent claims are.

24 And Chapman also has allegation issues, so I think we  
25 still identify that on page 3 of the complaint they say that



1 Old GM is now known as New GM, which is the successor-in-  
2 interest issue, or that they claim that in 2004 New GM marketed  
3 the vehicle. Now, I assume there's a lot of these allegations  
4 complaints and believe me, Your Honor, we have over 100 that  
5 we're dealing with. We try to clean up the allegations, but we  
6 don't necessarily try to come to Your Honor for that kind of  
7 relief because we feel that we'll be able to get to that point  
8 at some point. But we do do it with regard to punitive damages  
9 and claims that are not recognized by the Court.

10 In Tibbetts you have the allegations issue about New  
11 GM's supply of the vehicle, which was a 2005 Cadillac, which  
12 wasn't true. In the claims section in Tibbetts, they assert --  
13 in the strict liability they use words like "duty to warn."  
14 Now, strict liability is normally an assumed liability, but  
15 they stuck "duty to warn" in there. To the extent that duty to  
16 warn is Old GM's duty to warn, then that would be okay, but  
17 it's hard to tell.

18 In negligence they have failure to identify the  
19 defect and failure to recall. Those are things that were  
20 clearly isolated by Judge Gerber in his December decision as  
21 not being an assumed liability, but like in Chapman, Tibbetts  
22 asks for punitive damages for all of their counts. So they  
23 have taken their position, and we could not move them on this,  
24 that assumed liabilities includes that they are entitled to  
25 punitive damages for an assumed liability and we're not sure if





1 they're asserting these counts as an independent claim, which  
2 they're not entitled to do, or an assumed liability, but in  
3 either event, they're not entitled to the damages -- I mean,  
4 punitive damages.

5           And when you look at both Chapman and Tibbetts, and  
6 to some extent Fox, if they were entitled to assert it as an  
7 independent claim, they are doing something that is contrary to  
8 the definition of an independent claim. An independent claim  
9 is supposed to be something that New GM established post-sale,  
10 unrelated to something that it had assumed pursuant to the sale  
11 agreement, unrelated to the provisions of the sale agreement,  
12 something that would constitute a new duty based on a  
13 relationship that New GM had established with an Old GM vehicle  
14 owner.

15           When you look at the phraseology of the Chapman  
16 complaint and on the Tibbetts complaint, they say things like  
17 that the duty to warn is based on having accepted  
18 responsibility to certain assumed liabilities. So Chapman says  
19 that in paragraph 13 and Tibbetts in paragraphs 37 through 39.  
20 They framed a duty to warn as an assumed liability that New GM  
21 assumed the responsibility that Old GM had. Those things are  
22 antithetical to what Judge Gerber had defined as an independent  
23 claim, so I think, to some extent, we're fighting over  
24 something that is, at most, an assumed liability to the extent  
25 that the Court recognized as an assumed liability.



1 And so to circle back to what Your Honor had said,  
2 which is did you resolve it, and I said no; I said, seems to me  
3 resolvable in some respects because if all their adversary is  
4 duty to warn as an assumed liability -- and let me be clear on  
5 this -- duty to warn as an element of a cause of action that  
6 could be part of an assumed product liability, because that's  
7 what we agreed to assume, then we don't have an objection to  
8 it. But because we have these issues that we have the problem.

9 THE COURT: Tell me what issue is pending before the  
10 Second Circuit.

11 MR. STEINBERG: The Second Circuit, first has -- to  
12 some extent has the subject matter jurisdiction before it, but  
13 the -- it has the three motions to enforce. The three motions  
14 to enforce that were filed in the spring of 2014 were to  
15 enforce the sale order with respect to pre-sale accidents, to  
16 enforce the sale order with regard to economic loss claims for  
17 any vehicle with the ignition switch defect and with a vehicle  
18 without the ignition switch defect. So --

19 THE COURT: And what's the status in the Second  
20 Circuit?

21 MR. STEINBERG: The Second Circuit argument was had  
22 in middle of March, so it's now subjudice with the Second  
23 Circuit for this length of time, three months.

24 MR. WEINTRAUB: Your Honor, I would just need to  
25 correct one statement since we're talking about what's before



1 the Second Circuit.

2 THE COURT: You'll get a chance to talk about it in a  
3 second. Just wait --

4 MR. WEINTRAUB: This is not argument, it's factual,  
5 Your Honor.

6 THE COURT: Can you just wait until I -- you get a  
7 chance to talk. Okay? Don't interrupt.

8 MR. WEINTRAUB: Yes, Your Honor.

9 THE COURT: Go ahead, Mr. Steinberg.

10 MR. STEINBERG: So what's not before the Second  
11 Circuit specifically is anything to do with post-closing  
12 accident plaintiffs because that wasn't the subject of the  
13 first three motions. What was in front of the Second Circuit  
14 is the issue about vehicle -- a plaintiff's vehicle with the  
15 ignition switch defect and one without the ignition switch  
16 defect and whether -- who has successfully a due process  
17 violation and what can go forward. And there the only  
18 modification to the sale order that Judge Gerber made was for  
19 ignition switch defects to people in the first recall. He said  
20 they can assert an independent claim, but he was not nullifying  
21 the sale order with regard to vehicles with a non-ignition  
22 switch defect.

23 What happened, and I think it's a good segue to what  
24 happened after the April 15th, 2015 decision and the June 1  
25 judgment is that we had a lot of lawsuits that were pending and



1 we weren't -- I was sure but the plaintiffs on the other side  
2 may not have been sure as to the application of the ruling to  
3 their cases. So we set up a -- and we had urged Judge Gerber  
4 to dismiss these cases because we thought we had one outlier.  
5 Judge Gerber, in effect, stayed the cases and set up a  
6 procedure for people who felt that they shouldn't be stayed to  
7 indicate why they wouldn't be bound by the decision.

8           And so that led to a number of, in effect, no state  
9 pleadings that were being filed. Some people, again, used this  
10 as an opportunity to challenge the jurisdiction, the subject  
11 matter jurisdiction of the bankruptcy court. That was the Gary  
12 Peller type decisions. In one case, the Dolly Walton case,  
13 which was a post-sale accident without the ignition switch  
14 defect, the issue of punitive damages became star because we  
15 had moved to strike the punitive damages. We ultimately  
16 settled the Walton case while all of this was pending, with  
17 Walton agreeing to withdraw the punitive damage claim.

18           When we had a hearing on August 31st there was a case  
19 called Bablosec (phonetic). Bablosec was another post-sale  
20 accident without the ignition switch defect. They wanted to go  
21 forward to trial. We had said, you had asserted punitive  
22 damages, you're not entitled to do that. Judge Gerber said  
23 we're going to, in effect, directly address that issue and  
24 you're not going to go forward on your trial, but if you want  
25 to file a pleading, let me know; and then two days later they



1 withdrew their punitive damage request.

2           So the issue of non-ignition switch defects, people  
3 with vehicles without the non-ignition switch defect, was  
4 clearly the subject of the proceedings that led to the April  
5 decision, June judgment. But specifically, you got to the  
6 November decision and the December judgment, Judge Gerber had  
7 to deal with post-sale accidents where claims had been  
8 asserted. And he had that both for non-ignition switch --  
9 people without the non-ignition switch, and he had it for  
10 ignition switch cases. And he was asking us to mark up  
11 pleadings in connection with both cases so that he can give  
12 general pronouncements as to what would work and what doesn't  
13 work.

14           THE COURT: Am I correct that counsel in Fox,  
15 Tibbetts, and Chapman received the notice letter from GM's --  
16 New GM's counsel advising them of the procedures that were  
17 going to take place and that they didn't file anything or  
18 participate before Judge Gerber? Am I correct in that?

19           MR. STEINBERG: That is correct.

20           THE COURT: And there seems to be a dispute between  
21 you as to whether Judge Gerber's September 3 scheduling order  
22 required marked pleadings in all post-closing accident cases or  
23 your position in the reply is it was only in -- that it could  
24 be done in representative cases. Is that --

25           MR. STEINBERG: Your Honor, I think the record will



1 be clear that my position is correct, and I'll tell you why.

2 THE COURT: I'm sure that's your position.

3 MR. STEINBERG: No, no, no. But I'll tell you why in  
4 the context of what happened here. The MDL complaint was over  
5 1,000 pages. The -- each of the bellwether complaints were  
6 over 100 pages. We had suggested to Judge Gerber a schedule  
7 which he considered way too lax, that he -- that would stretch  
8 months and he said I'm resolving his issues very quickly.

9 And so we said to the judge, Judge, you understand  
10 that all of the complaints that are involved are thousands and  
11 thousands of pages.

12 THE COURT: How many did you mark up?

13 MR. STEINBERG: We marked up the six bellwether  
14 complaints, we marked up the two state court complaints, we  
15 marked up the MDL complaint as flagging general issues. We did  
16 other complaints which are non-ignition -- vehicles without the  
17 ignition switch defect, at least three or four -- at least  
18 three of those, because they were covered by our other  
19 complaints letter.

20 THE COURT: And you believe that the, quote/unquote,  
21 "representative complaints" that you marked up are -- embody  
22 characteristics of Fox, Chapman, Tibbetts?

23 MR. STEINBERG: Yes. Yes. I mean, I think you can  
24 see that the issues on Fox, Tibbetts, and Chapman are really  
25 three types of claims. They are duty to warn, failure to



1 identify a defect, and failure to recall. All of them are  
2 specifically addressed in the December decision. And I'm  
3 giving them more credit about what is actually alleged because  
4 in Tibbetts, failure to identify a defect and failure to recall  
5 are words that are used in a count that's described as  
6 negligence. And negligence, generally for a product case,  
7 would be an assumed liability. Some of those things that are  
8 alleged, though, don't constitute the negligence the judge is  
9 talking about. It's negligence in the design of the car and  
10 those types of things.

11 And he also said that to the extent that someone --  
12 there was a viable duty under state law to warn, that you can  
13 assert that as a causation issue in connection with an assumed  
14 product liability. So those representative samples were  
15 clearly covered.

16 But Judge Gerber had given us five pages to comment  
17 on a thousand-page complaint. He had given us three pages to  
18 cover all the other complaints that weren't covered by anything  
19 else and he basically -- we said to the judge, we could  
20 overwhelm you with stuff; I don't know whether we could produce  
21 all of it within the two-a-week and three-week time frame that  
22 you gave us to do all of this stuff, but we think we can  
23 summarize this thing for you as a representative sample.

24 And when I said that everybody got the letter, they  
25 got notices, at least Tibbetts and Chapman got notices before



1 the September 3 order. Fox got it the day afterwards, but all  
2 of them got the September 3 letter, which was the letter that  
3 was referenced in the September 3 scheduling order, which  
4 basically says you're getting this thing, you have the right to  
5 participate if you believe that -- and if you don't  
6 participate, you're going to be bound by my ruling.

7           And the whole purpose of Judge Gerber going through  
8 this exercise was to -- he knew that -- he had announced that  
9 he had retired -- he was going to be retiring at the end of the  
10 year and he wanted to be able to finish what he believed his  
11 responsibilities were in General Motors and he was going to  
12 give the general pronouncements that everybody would have to be  
13 bound by and if he was going to let something go through the  
14 gate, then he'll let another Court decide it, but in the  
15 context of his specific rulings.

16           When he says you can't assert punitive damages, that  
17 didn't get through the gate. That was his actual ruling and we  
18 argued in our papers that's collateral estoppel to everybody  
19 here. They had an opportunity to litigate, they didn't choose  
20 to litigate, they decided to not deal with it. And clearly,  
21 from the references that we gave to you in the scheduling the  
22 order, the scheduling hearing, Judge Gerber said, I want to  
23 make sure I cover vehicle owners without the ignition switch  
24 defect. And the counsel there stood up and said that we were  
25 going to deal with it. And we made sure to flag on these





1 issues that --

2 THE COURT: The colloquy with Mr. Weisfelner.

3 MR. STEINBERG: Right. That was that colloquy, but  
4 the judge had already said before his -- in his scheduling  
5 order, he says, I need to be able to address vehicles without  
6 the ignition switch defect. He says -- and he tells Mr.  
7 Weisfelner at the hearing that, you know, some of your clients  
8 have gotten relief by the modification to the sale orders and  
9 some didn't, but I need to address it. And you could see from  
10 Judge Gerber's language in the November decision, he basically  
11 said, I gave you an opportunity to address it and you didn't  
12 address it.

13 The fact of the matter is, is that Tibbetts and  
14 Chapman and Fox don't really challenge due process in the same  
15 way that the ignition switch defects have challenged it.  
16 Ignition switch defects argued they were known predators  
17 because Old GM knew of the ignition switch defect and they --  
18 we agreed to certain factual stipulations. Judge Gerber  
19 interpreted the factual stipulations. We disagree with how he  
20 interpreted, it's the subject of a Second Circuit appeal, but  
21 that was presented to Judge Gerber and Judge Gerber ruled on  
22 the ignition switch defect and said that they had established  
23 enough with prejudice to have a limited modification to be able  
24 to assert independent claims.

25 THE COURT: Mr. Steinberg, let me ask, do you believe



1 that -- I mean, we'll see when the Second Circuit rules. It  
2 could be quick; it could be a very long time. Do you believe  
3 it's going to be dispositive of the issues raised on these  
4 motions and the ones you're about to file or just filed?

5 MR. STEINBERG: I think that the Second Circuit will  
6 have to deal with the subject matter jurisdiction issue, which  
7 is Manville 4, which is raised on appeal. Frankly --

8 THE COURT: I thought Celetex was pretty dispositive  
9 of the subject matter jurisdiction issue, but --

10 MR. STEINBERG: Well, I think that -- look, the sale  
11 order dealt with the issues raised by Manville for the appeal.  
12 I think it was in Campbell specifically referenced Manville 4  
13 and said, well, this was a different circumstance. And then  
14 the appeals were dismissed on an equitably moot ground.

15 The four threshold issues -- we were briefing  
16 Manville 4 in the four threshold issues. Judge Gerber said he  
17 had jurisdiction to do it. Gary Peller, on behalf of his non-  
18 ignition switch defect clients, and the ignition switch defect  
19 clients, challenged Manville 4 every argument. Judge Gerber  
20 almost sanctioned him for saying he's raising a frivolous  
21 appeal, frivolous comment. He already decided it before. So  
22 four times Manville 4 has been decided and now it's up on the  
23 Second Circuit and the Second Circuit will have a chance to  
24 resolve it.

25 Some of the issues about independent claim, the

1 colloquy on the second circuit was -- I mean, we had raised the  
2 issue as to whether we had stipulated that 24 people had --  
3 actually knew of the ignition switch defect in order to  
4 substantiate a recall. And the colloquy, and it will be borne  
5 out by the transcript if Your Honor wants to see the  
6 transcript, has at least Justice Chin saying, I didn't see it,  
7 meaning that can you show me where they said that. And then he  
8 asks specifically Mr. Berman, who was arguing on behalf of the  
9 MDL clients, he said, are you saying that you should have more  
10 discovery or were you reliant on the factual stipulations. And  
11 Mr. Berman says, I think you could decide this based on the  
12 factual stipulations, we're not saying we need more discovery;  
13 whatever is in the closed record, you can decide whether it  
14 substantiates.

15           So to the extent that the entire independent claim  
16 notion is triggered by whether we knew enough to justify a  
17 modification of a final and non-appealable sale order that  
18 existed for six years, that is in the Second Circuit and that  
19 is the triggering point. The problem is, is that we have cases  
20 that are going forward in the state court. Some cases are  
21 closer to trial than the other. You know, Tibbetts and Chapman  
22 certainly could wait until July 18th to deal with the other 11  
23 cases that we had. Fox could probably even wait too, but since  
24 we've been accused of being dilatory and clever in trying to  
25 delay all -- everything here, I'm happy to deal with the Fox



1 issue now, recognizing that I'm not exactly sure what we are  
2 really fighting over in Fox in that.

3           If it truly is just an assumed liability that he's  
4 asserting, then I've been told by product lawyers, of which I'm  
5 not, I'm a restructuring lawyer as Your Honor knows, is that if  
6 you have a certain duty to warn as part of your strict  
7 liability, as part of your otherwise negligence claim, you're  
8 going to get the same compensatory damages. All roads lead to  
9 the same amount anyway. People have it as an additional count.  
10 They want to be able to say something.

11           In the Fox case, what we have as an issue is that  
12 they still have New GM allegations and we just said, we won't  
13 fight you by putting it in, but it can tie into, in effect,  
14 what would otherwise be an independent claim in a New GM cause  
15 of action.

16           I will say to Your Honor that we actually have  
17 something that's brewing unrelated to this case, but Your Honor  
18 should understand because it relates to something that's here,  
19 is that we agreed with one plaintiff in the Texas MDL to amend  
20 their complaint and they agreed to narrow -- it was an ignition  
21 switch case and we agreed to narrow it only for certain  
22 allegations which they say constitute their independent claim.

23           And now they've made a motion to, in effect, lift the  
24 cap on punitive damages in the Texas court and the entire  
25 complaint is based on Old GM conduct and Old GM things, so



1 we're trying to figure out how to deal with those issues. But  
2 part of the problem that we face is that while we clean it up,  
3 as you get closer to trial or as you get closer to filing other  
4 briefs in connection with the case, the things that we thought  
5 we resolved re-emerge again. So one of the things that we  
6 would certainly be urging to Your Honor as -- if you resolve  
7 this in our favor is the dismissal of these claims and these  
8 requests with prejudice so there's no issue that these things  
9 will re-emerge at a later point in time.

10 The procedures that we followed, and I think --

11 THE COURT: I don't know how I discuss claims with --  
12 I can enjoin parties from prosecuting claims, but it isn't for  
13 me -- the cases -- the underlying cases are not pending before  
14 me, I can't dismiss them. I could enjoin parties from  
15 prosecuting them.

16 MR. STEINBERG: Your Honor is absolutely correct. I  
17 spoke too shorthand on that. That's all that you can do. Your  
18 jurisdiction is for the parties in front of you to not be able  
19 to assert these types of claims.

20 THE COURT: Right.

21 MR. STEINBERG: And that's like the -- all we can ask  
22 you to do on that.

23 THE COURT: You know, with respect to Fox, I'm going  
24 to hear counsel in a minute but, you know, one of the things in  
25 my mind is that, hey, you know, if they really think you're



1 going to go to trial in September, the -- it may be I'm just  
2 not going to let them go to trial with the independent claims  
3 argument. They want to -- you know, they're trying to  
4 condition on something I don't -- you know, if they work out an  
5 agreement with New GM, fine, but if they don't, I mean, part of  
6 my reaction is I'm going to enjoin it until they stop. I'm  
7 going to enter a preliminary injunction against them until the  
8 Second Circuit rules. It could be a year from now, it could be  
9 four or five months from now.

10           Because I think that what the Second Circuit has to  
11 say may well be dispositive of the issues, if there's service  
12 and I see that they say, well, it will go to the jury now, it  
13 won't go to a bench trial in September, I know they count on  
14 having a decision from the Second Circuit with serious issues  
15 that quickly.

16           But, you know, those all may simply be -- I'm going  
17 to enjoin it and when the Second Circuit rules, I'll revisit if  
18 I have to, but we shouldn't think that they're going to go  
19 forward but I might, you know, want to wait and hear what they  
20 want to say about it.

21           Go ahead, Mr. Steinberg.

22           MR. STEINBERG: Your Honor, on Grumman Olson, there  
23 are six reasons why we think that is not useful precedent. One  
24 is the one that I think Your Honor had first touched on, which  
25 is that when you assume the liability under the sale agreement,



1 you're taking it out of the Grumman Olson precedent.

2 THE COURT: Yeah. I mean, Grumman Olson, the due  
3 process clearly on Judge Marston -- I read both Judge Marston's  
4 decision and the district court decision in my bankruptcy class  
5 at Columbia, we spent a whole class dealing with due process  
6 issues, so I'm very familiar with these due process issues.  
7 But Grumman Olson, the due process issue was because unknown  
8 claimants there couldn't be -- abide by a sale order.

9 Well, it's not an issue here because there is an  
10 assumption of liabilities.

11 MR. STEINBERG: Right. So that's absolutely correct  
12 and so the first thing -- and actually the district court  
13 decision in Grumman Olson, in distinguishing the fact pattern  
14 in that case to the GM case, the GM case was different because  
15 they had assumed the liability. And when you think about it,  
16 what was the Grumman Olson thing most concerned about? It was  
17 that these potential future creditors down the road didn't have  
18 a remedy and that the seller was now defunct, and therefore, as  
19 a matter of policy, where are you going to provide?

20 In effect, it's a relaxation of the successor  
21 liability finding, which is derivative of an obligation that  
22 the seller, Old GM, had. So one of the distinguishing features  
23 of Grumman Olson is that the whole thrust of an independent  
24 claim is that it can't be based on Old GM conduct. And if they  
25 want to use Grumman Olson as a basis to say, well, I should be



1 able to assert an independent claim, it's counter to what  
2 Grumman Olson stood for and the reason why it had its holding.

3           The other thing is that Grumman holding was an  
4 exception to the successor liability case and they're explicit  
5 in their papers, saying, I'm not looking to change the  
6 successor liability finding. Their issue that I had said  
7 before, what they're asserting in Grumman Olson, is really  
8 dressed up in assumed liability, and I gave Your Honor the  
9 specific allegations where they're basically saying, I'm suing  
10 them because of a liability that they had assumed pursuant to  
11 the sale agreement.

12           And Grumman Olson was actually raised at the October  
13 hearing by Mr. Weintraub, on behalf of the clients that he was  
14 representing at the time, as to why the Court shouldn't bind  
15 them for being able to assert punitive damages and Judge Gerber  
16 rejected that argument. So for all of those reasons, I think  
17 Grumman Olson is not applicable.

18           On Manville 4, I told you four times so far GM has  
19 won on that issue, but when you look at Manville 4 and what was  
20 driving what was a tortuous history of a case that went up and  
21 down and up and down, was that the two distinctions between an  
22 in rem transaction and in personam transaction, a sale of  
23 assets is unlike what happened in Manville 4, is an in rem  
24 transaction. The claims against the purchaser where they're  
25 asserting success or liability is derivative through a debtor





1 and that's the opposite of an independent claim. They were  
2 arguing that they shouldn't be able to -- they should be able  
3 to assert their independent claim against the other insurer  
4 with regard to insurance contracts that had nothing to do with  
5 the debtor; a totally different circumstances that is here.

6           The thrust of Manville 4 is that nobody contemplated  
7 that Chubb would be barred. Here, the sale hearing, the sale  
8 order expressly dealt -- tackled with this issue. The original  
9 motion that was filed did not provide for, in effect, assuming  
10 post-closing accidents. It was amended based on people who  
11 stood up in court on behalf of the future accident victims, the  
12 states' attorney generals, et cetera, and they specifically  
13 recognized that they were going to assert this until they were  
14 satisfied; and ultimately they were satisfied.

15           So unlike Manville 4, when they found the document  
16 four years into the appellate history that basically said, we  
17 never intended to enjoin this type of claim, this was a case  
18 where they expressly decided and Judge Gerber made decision on  
19 that. And Judge Gerber actually said that no successor  
20 liability finding is the kind of thing that would otherwise be  
21 federally preempted under Section 363 adopting the same kind of  
22 rationale of White Motor.

23           And he also said it's different because -- than the  
24 Manville 4 paradigm because we had a situation where we're not  
25 extinguishing claims but they're channeled to the proceeds of



1 sale. The plan could deal with this; something after the sale  
2 can deal with it. This is a totally different situation. And  
3 he said, as a general matter, you take away the bankruptcy  
4 court's ability to deal with the sale of the assets and those  
5 things that are integral to the sale, you won't have much left  
6 in the in rem jurisdiction of the bankruptcy court to follow.

7           So when you take a step back, we have a situation is  
8 you have a clear order that says independent claims cannot be  
9 asserted by a post-closing accidents without ignition switch  
10 defect, and they can't assert punitive damages. They are doing  
11 that. They were notified of the proceedings before Judge  
12 Gerber ruled. They were notified of the proceedings after  
13 Judge Gerber ruled. They refused to make any of these changes  
14 that they should have to make. And their defense is now, after  
15 being exposed for what they're doing, is that I want to raise  
16 due process in Grumman Olson style or due process in Manville 4  
17 style, all of which have been rejected.

18           We've been trying to deal with the whole slew of the  
19 plaintiffs' bar to get them to understand that there's certain  
20 things they can do and certain things that they can't do within  
21 the confines of the Court's rulings. These are the first set  
22 of people who we're having major issues with and hopefully we  
23 can get this resolved quickly. Thank you.

24           THE COURT: Thank you.

25           MR. WEINTRAUB: Good morning, Your Honor. William



1 Weintraub of Goodwin for the state court --

2 THE COURT: If you would like to now -- if you would  
3 now like to correct what you thought that Mr. Steinberg was --  
4 misstated, I'll let you do it, but I don't let you interrupt.

5 MR. WEINTRAUB: I understand, Your Honor. I didn't  
6 want that point to be lost, and it won't be lost. I'm going to  
7 correct almost everything that Mr. Steinberg said.

8 Your Honor, going out of order and just trying to  
9 address the high points of Mr. Steinberg's presentation before  
10 I go into my own presentation, I want to emphasize a few  
11 things.

12 First of all, Your Honor, no court has decided that  
13 non-ignition switch defect post-sale accident plaintiffs cannot  
14 assert an independent claim. That's never been decided. There  
15 is a due process issue here that we believe is fundamentally  
16 different than the ignition switch due process issue that was  
17 determined in connection with the four threshold issues.

18 There the issue, which basically focused on successor  
19 liability issues because post-sale accidents were not yet an  
20 issue in the case, was whether the claimants there were known  
21 or unknown creditors of Old General Motors, and whether the  
22 ignition switch defect was a known defect or not, which  
23 required a recall in advance of the sale notice which, when  
24 joined with the sale notice, would have told those people that  
25 they had claims that needed to be protected. That has nothing



1 to do with the independent claims that we're talking about  
2 today.

3           The independent claims are a claim against New  
4 General Motors based solely on its post-sale conduct. And  
5 there's no order in this case, Your Honor, that's effectively  
6 barred those claims. Grumman Olson is not cited by us as a  
7 successor liability case. It is cited as a case that holds  
8 that future claimants cannot be enjoined in a proceeding that  
9 they were not given proper notice of and did not participate  
10 in. We understand the difference between a successor liability  
11 claim and an independent claim, but the overriding issue in  
12 Grumman Olson was whether future claimants got effective notice  
13 to be able to come into the court and defend their rights. No  
14 one in --

15           THE COURT: If the accident didn't -- hadn't occurred  
16 --

17           MR. WEINTRAUB: Right.

18           THE COURT: -- you couldn't know who they are. They  
19 couldn't have known that they had to come in. I understand  
20 that.

21           MR. WEINTRAUB: Right. And not just that the  
22 accident hadn't occurred yet, Your Honor, also that GM's post-  
23 sale conduct hadn't occurred yet. No one before the sale knew  
24 how GM would act or not act.

25           THE COURT: What specifically is the New GM post-sale



1 conduct that you believe gives rise to the independent claims  
2 that you're seeking to press?

3 MR. WEINTRAUB: Your Honor, there would be a whole  
4 panoply of those, and since I'm not the state court litigator,  
5 I can only give an example. So for example, failure to warn,  
6 the position of many is that New GM inherited the employees,  
7 the information and knowledge, the books and records with  
8 respect to all defective vehicles; not just ignition switch  
9 defect vehicles, all vehicles.

10 If it can be proven in trial, because as Judge Gerber  
11 was very clear, I don't decide, once it's past the date, the  
12 merits of the independent claim, the state court does that. If  
13 it could be shown that people were permitted to ride around in  
14 defective vehicles where, if they had been noticed, they would  
15 have stopped driving the vehicle or had the vehicle corrected  
16 or fixed, they may have never have had that accident.

17 So when New General Motors argues that there's no  
18 independent claim because we've agreed to successor liability,  
19 successor liability focuses on the conduct of Old GM and  
20 there's no requirement to have a successor liability claim that  
21 there be culpable conduct on the part of New GM.

22 With respect to an independent claim as distinct from  
23 a successor liability claim, the lynchpin of the independent  
24 claim is culpable conduct, so it's a different claim. So when  
25 New General Motors says, I assume liability for post-sale



1 accidents, they're also saying if you can't have an independent  
2 claim, that because I'm paying the estate of someone who was  
3 killed in an Old General Motors vehicle, the fact that New  
4 General Motors let that person ride around in that vehicle for  
5 two, three, or four years before that person had the fatal  
6 crash, you don't get to complain about that because we're  
7 paying you compensatory damages. We don't agree with that.

8           We think, and Judge Gerber agreed, with respect to  
9 the ignition switch defect cases, that there can be punitive  
10 damages. We won on two paths for punitive damages with respect  
11 to the bellwether trials, which were ignition switch defect  
12 cases. So we fundamentally disagree that Grumman Olson is not  
13 applicable here.

14           THE COURT: So I don't want to get in the middle of  
15 your so far unsuccessful negotiations, but on page 2 of your  
16 June 23rd letter where you say "We have also offered to drop  
17 that claim," which is the failure to warn claim against New GM,  
18 that GM will simply agree to a proposed consent stipulation to  
19 be filed in this court that will avoid what we anticipate GM  
20 will otherwise do. It goes on from there. I'm not going to  
21 read it.

22           What claim are you offering to drop? I don't  
23 understand that because you're now arguing --

24           MR. WEINTRAUB: Your Honor, I'm not directly involved  
25 in those negotiations.



1 THE COURT: Well, you wrote the letter. You signed  
2 the letter.

3 MR. WEINTRAUB: That's right, but all I said was  
4 negotiations aren't --

5 THE COURT: Well, tell me what you meant in the  
6 letter.

7 MR. WEINTRAUB: What I meant in the letter was  
8 there's no agreement yet, and that there are --

9 THE COURT: Well, what did you offer to drop?

10 MR. WEINTRAUB: Counsel offered to drop the claim if  
11 they could reach a stipulation with respect to certain matters  
12 that, since these are settlement discussions, I don't feel  
13 comfortable saying on the record.

14 THE COURT: And I don't want to know about the  
15 settlement discussions.

16 MR. WEINTRAUB: Right. So all I could say is they  
17 could not agree to the terms of the stipulation that my client  
18 was requiring in order to drop the claims.

19 THE COURT: Okay.

20 MR. WEINTRAUB: The thing I was trying to correct  
21 before, Your Honor, is Mr. Steinberg misspoke. The third  
22 motion to enforce, which is the motion for economic damages  
23 asserted by non-ignition switch defect people, was never heard  
24 by Judge Gerber. If you go to Judge Gerber's long decision, I  
25 think it's in the first three or four pages where he sets forth



1 the three motions to enforce, and he says that he's going ahead  
2 with respect to the ignition switch defect, economic damages,  
3 and the pre-closing ignition switch defect.

4 But the third motion, which is the non-ignition  
5 switch economic damages, he expressly says is being deferred.  
6 So his opinion that was issued in April of 2015 does not  
7 address those issues and therefore it is not one of the issues  
8 that's on appeal because it wasn't adjudicated or determined.

9 With respect to whether or not my clients received  
10 more complaints, they did not receive more complaints.

11 THE COURT: Well, I don't -- look, I have to tell you  
12 on this one I think that Mr. Steinberg (indiscernible) had a  
13 much better side of the argument. I don't read Judge Gerber as  
14 having required marked pleadings in every case in which GM, New  
15 GM, contended that there were improper claims being asserted.  
16 I read it as requiring a representative sample, not everyone.  
17 That's why I asked Mr. Steinberg -- and I don't think you  
18 dispute this -- that you or the state court counsel received a  
19 copy of the letter that put him on notice of the hearing before  
20 Judge Gerber and an opportunity to participate, which they  
21 didn't take up. Do you agree with that?

22 MR. WEINTRAUB: Your Honor, I don't agree that there  
23 was an opportunity to participate.

24 THE COURT: Really?

25 MR. WEINTRAUB: Yeah, I'm going to get to all of it.





1 THE COURT: Well, did they show up and say, "We want  
2 to participate"?

3 MR. WEINTRAUB: No.

4 THE COURT: No. I read the letter as giving them a  
5 -- putting them on notice of the hearing. They could have come  
6 in; they didn't. I don't -- I disagree with your apparent  
7 reading that required New GM's counsel to give a marked-up  
8 pleading in every case where they believe allegations were  
9 impermissible. I read it is as requiring representative  
10 pleadings, not everyone, and that they did that in that people  
11 in your situation had the opportunity to either negotiate with  
12 GM or come in before Judge Gerber and they didn't.

13 MR. WEINTRAUB: And I disagree with all of that, Your  
14 Honor, and --

15 THE COURT: Okay. Well, you can disagree --

16 MR. WEINTRAUB: But let me --

17 THE COURT: -- but I'm the one that has to rule.  
18 That part I did -- that part is clear as day to me.

19 MR. WEINTRAUB: Well, let me explain why I disagree  
20 with you and then you tell me --

21 THE COURT: Okay.

22 MR. WEINTRAUB: -- whether you agree with me or not.  
23 With respect to the marked pleadings, I'm not saying that every  
24 plaintiff in America was required to get a marked pleading.  
25 But if you read that paragraph, what it says is people got



1 letters, and that people who got letters would get marked  
2 pleadings, and it refers to "such representative cases." Such  
3 representative cases, Your Honor, relates back to the people  
4 who got letters.

5 THE COURT: That I'm ruling against you on. You can  
6 drop that argument and move on from there.

7 MR. WEINTRAUB: Okay.

8 THE COURT: I do not -- I conclude that GM, New GM,  
9 did not have to provide marked pleadings for every matter where  
10 they believed that the allegations of the complaint ran afoul  
11 of Judge Gerber's rulings. It would be a different story if  
12 the clients you're representing, the counsel, state court  
13 counsel, whatever, hadn't received a letter -- and they got the  
14 letter -- putting them on notice that this is how it's going to  
15 go forward. They could have found that they didn't have --  
16 they could have found all of the so-called representative  
17 pleadings and see what New GM was saying. And they could have  
18 gone and negotiated with Mr. Steinberg or his colleagues or  
19 other counsel about it. So that part I'm ruling against you.

20 MR. WEINTRAUB: I understand, Your Honor, but I will  
21 get to the other part, which is the more important part, I  
22 think, which is the scheduling order. We don't believe, and  
23 the letters that they received, we don't believe told our  
24 clients or anybody else in this category that one of the issues  
25 to be adjudicated were independent claims against New GM based



1 upon New GM's post-sale conduct. And I will show you when I  
2 get there the letters from Mr. Steinberg that talk about not  
3 being able to sue New GM for punitive damages based upon Old GM  
4 conduct, and --

5 THE COURT: Let me just say, Mr. Weintraub, I'm not  
6 ruling on this point at this point, but I have a problem with  
7 Mr. Steinberg's argument with respect to independent claims  
8 that are based solely on New GM's post-sale conduct, accident  
9 cases. Economic loss is a different issue from my standpoint,  
10 but on accident cases post -- New GM post-sale conduct, I'm not  
11 ruling yet, but that I'm having some pause with. Okay. Go  
12 ahead.

13 MR. WEINTRAUB: Thank you, Your Honor. So just to  
14 try to round out, like I said, I had a long presentation just  
15 to address some of the things Mr. Steinberg said, and I may  
16 revisit these in my presentation. We don't believe that the  
17 Second Circuit decision is going to be dispositive of this  
18 issue because this issue on this particular due process  
19 violation is not before the Second Circuit.

20 As I said earlier, the issue before the Second  
21 Circuit is whether the pre-closing accident plaintiffs and the  
22 non-ignition switch people were known or unknown creditors of  
23 Old GM. And the issue that I'm raising here is a different  
24 question which is how do you bar prospectively independent  
25 claims against the buyer where the conduct has not yet occurred



1 and the injury has not yet occurred. And I think that's a  
2 different question and it's not before the Second Circuit yet.

3           Your Honor, we do think that Manville IV is directly  
4 on point. The issue in that case was the quality of notice and  
5 the ability to bar independent claims. We think that with --  
6 in Manville IV, Chubb, which is an issue that took 24 years to  
7 percolate and get resolved, so this is way ahead of 24 years  
8 here. Chubb was already a creditor at that point in time. It  
9 already had its independent claim because the Manville case had  
10 been going on for years, Chubb's independent claim was based  
11 upon a contribution claim, and that contribution claim already  
12 existed.

13           Our case is one removed from that because, as we said  
14 earlier, the injury didn't happen yet and the conduct hadn't  
15 happened yet. And what the Second Circuit said in Manville IV  
16 is that Chubb would have had to have been prescient to read  
17 that notice and figure out that some court down the road would  
18 say that their independent claim is barred, and I think we have  
19 the same issue here.

20           I don't understand how lay persons like Fox and  
21 Chapman and Tibbetts could ever get the notice that was in this  
22 case and divine from there that they had independent claims  
23 that they had to come into the bankruptcy court in 2009 and  
24 protect. In fact, Judge Gerber, who we all know is a 35, 40-  
25 year bankruptcy expert and a bankruptcy judge, ruled in this



1 case that when he revisited the language that he had approved  
2 in 2009, he said if somebody had come to me in 2009 and said  
3 you're going too far, I would have agreed with them. So Judge  
4 Gerber apparently missed this issue in 2009, but Tibbetts and  
5 Chapman and Fox, how were they supposed to catch it?

6           Your Honor, we think there are really just two issues  
7 before the Court this morning. First, are these state court  
8 plaintiffs barred from seeking to prove a claim against New GM  
9 based on its own post-sale conduct? These are allegations that  
10 New GM did something or failed to do something after the 2009  
11 sale closed that contributed to or permitted an accident to  
12 occur. No one is asking this Court to determine whether New GM  
13 is or is not culpable or whether New GM had a duty to act. The  
14 issue in the parlance of Judge Gerber and his prior decisions  
15 is whether the ability to even assert the claim gets through  
16 the bankruptcy gate.

17           The second issue here is if the Court is  
18 contemplating answering the first question in the negative, I  
19 think the Court has to ask itself did something happen in 2009  
20 in connection with the sale proceeding that was  
21 constitutionally sufficient to bar these plaintiffs, who had  
22 not yet had their crashes in 2009 and who could not predict in  
23 2009 that they would ever have a crash years later.

24           Did something happen that effectively barred them  
25 from bringing independent claims against New GM for its future



1 post-sale conduct? We don't think it did. We think as a  
2 matter of common sense as well as constitutional due process, a  
3 bankruptcy court cannot prospectively bar future claims by  
4 exonerating a buyer from its own post-sale conduct before the  
5 conduct even occurs.

6 As we said earlier, Your Honor, it's well-established  
7 in this court -- in this circuit that --

8 THE COURT: Mr. Weintraub, it wasn't clear to me from  
9 the pleadings that I reviewed that the claim is based solely on  
10 New GM post-sale conduct. You try to bootstrap arguments based  
11 on Old GM conduct, and I don't believe that's permissible.  
12 Okay. What was clear was there was a separately pleaded claim  
13 that made clear that it was based exclusively on New GM post-  
14 sale conduct and articulating what is the claim that you  
15 believe arises, I would have a much more clear-cut issue that I  
16 was dealing with, and I don't think I have that.

17 MR. WEINTRAUB: Your Honor, all I can say is that to  
18 the extent there needs to be re-pleading --

19 THE COURT: I'm not ordering --

20 MR. WEINTRAUB: I understand.

21 THE COURT: You know, all -- I'm going to do one of  
22 two things. I either can (indiscernible) or not. Okay. And  
23 as I said to Mr. Steinberg, what I may well do is enjoin the  
24 proceeding to try in September in Fox with the complaint  
25 currently on file. If you want to drop the alleged independent



1 claim, fine. If not, we'll all wait for the Second Circuit to  
2 decide, and I'll see what issues the Second Circuit decides and  
3 which ones it doesn't.

4 I've read and will continue to reread Judge Gerber's  
5 decisions operative to the issues before me. I don't think it  
6 really is clear that either of you make out in your arguments,  
7 and -- but, you know, I can only deal with the motion to  
8 enforce the plan with -- or the plan injunction with respect to  
9 the Fox plan as presently filed. If it was amended, if you've  
10 already agreed to take out the punitive damage claim, that  
11 would resolve one of the big issues. The independent claim  
12 issue, despite the correspondence from both sides, I don't know  
13 where it stands. I'm not getting in the middle of settlement  
14 negotiations. But I'll tell you this, Mr. Weintraub. I don't  
15 think Fox should plan on going to trial in September unless the  
16 Second Circuit decides the pending appeal very soon.

17 MR. WEINTRAUB: Your Honor, we think that what Judge  
18 Gerber clearly decided was that if a litigant can show a due  
19 process violation, then independent claims similar to the  
20 independent claims --

21 THE COURT: If Fox counsel had come in response to  
22 the letter received and teed up the issue, I think we would be  
23 dealing with something much clearer, but they chose to ignore  
24 it.

25 MR. WEINTRAUB: Your Honor, and I will get to that,



1 and maybe I should, but I think before I get to that, I need to  
2 really jump to kind of the background to how we got to  
3 October/November/December, because how we got there, the  
4 evolution of the case, is important to understanding why my  
5 clients looked at the correspondence and looked at the  
6 scheduling order and said, "We don't understand what this has  
7 to do with us because we're only asserting independent claims."

8           After the way the four threshold issues we think came  
9 about was after the existence of the ignition switch defect  
10 came to light in 2014, five years after the sale closed.  
11 Hundreds of lawsuits were brought. Anton Valukas was engaged  
12 by New General Motors, and it should report that focused on the  
13 ignition switch defect. New GM, as we said earlier, filed  
14 three motions to enforce the sale order. This motion was not  
15 one of the three. The first motion was limited to plaintiffs  
16 asserting economic losses based upon the ignition switch  
17 defect. Those are people that had not had accidents but were  
18 suing for the devaluation of their vehicle, the value of their  
19 vehicle.

20           The second motion was limited to pre-sale accident  
21 victims whose cars had the ignition switch defect. Those are  
22 people that had already had accidents and were suing New GM as  
23 a successor to Old GM.

24           The third motion targeted economic losses sued for by  
25 persons whose vehicles did not contain the ignition switch





1 defect then. I don't want to over-generalize, but I think this  
2 had to do with devaluation of the brand in general affecting  
3 all vehicles, including vehicles that did not have the ignition  
4 switch defect but had other defects. This was the motion that  
5 Judge Gerber deferred on.

6           The four threshold issues were confined to the first  
7 and second motions because they concerned the ignition switch  
8 defect, and the reason everyone focused on the ignition switch  
9 defect was because that was the explosion of litigation that  
10 was getting all of the publicity, and the parties had the  
11 benefit of the Valukas report which could be used to agree upon  
12 a set of stipulated facts that would aid Judge Gerber in ruling  
13 on the four threshold issues.

14           The key threshold issue, as I said earlier, was  
15 whether the economic loss ignition switch defect people and the  
16 pre-sale ignition switch defect accident people received due  
17 process in connection with the sale, sale motion, the sale  
18 hearing. The important point for this proceeding, which  
19 relates to the fourth motion, which was not filed until June 1  
20 of 2016, almost two years after the other three motions, is  
21 that the briefing on the four threshold issues and on due  
22 process that occurred in 2014 and '15 and that resulted in the  
23 April 2015 decision and the December -- I'm sorry, and the June  
24 2015 judgment did not address post-sale accidents and did not  
25 address non-ignition switch defect cases.



1           When Judge Gerber decided the independent claim issue  
2 as part of his April 2015 decision on the four threshold  
3 issues, he decided it based upon what was pending before him.  
4 The only thing pending before him with respect to independent  
5 claims were the ignition switch defect economic loss plaintiffs  
6 because clearly the pre-sale people didn't have independent  
7 claims.

8           There was no basis to decide this issue for any other  
9 party because no other parties were before him. But  
10 nonetheless the Court's logic and reasoning we think were  
11 appropriate with respect to if there's been a due process  
12 violation, independent claims can go forward.

13           The June 2015 judgment does nothing more than recite  
14 that the ignition switch defect economic loss plaintiffs could  
15 now assert independent claims against New GM. This limitation  
16 on the enforceable scope of the sale order was premised on the  
17 due process violation found by Judge Gerber. We talked about  
18 earlier that he found that there was a due process violation  
19 because this was a known defect. People should have been given  
20 either express notice or when joined with a recall, they would  
21 know that they had the ignition switch defect. They could have  
22 then protected themselves, and with respect to the ignition  
23 switch defect economic loss people, they would have had enough  
24 notice to come into court, object to the over-broad future  
25 exoneration of New GM, and Judge Gerber said I would have



1 entered a narrower order.

2           No other relief was granted on this point of  
3 independent claims because there were no other participants to  
4 the four threshold issues other than the ones that I  
5 identified. The June judgment implemented the April 2015  
6 decision and it was essentially a roadmap to show what claims  
7 against New GM were now permitted because certain ignition  
8 switch defect plaintiffs were successful, what claims against  
9 New GM were still stayed under the 2009 sale order because  
10 certain other ignition switch defect people were not successful  
11 on the four threshold issues briefing. That's what's up on the  
12 Second Circuit, Your Honor.

13           And to clarify that any other plaintiffs were still  
14 stayed by the sale order because those plaintiffs had not yet  
15 shown why the sale order should not be applied against them,  
16 the critical point for both the April 5, 2015 decision and the  
17 June 2015 judgment is neither of them address or cover or even  
18 mention post-sale accident cases. No defined term of the June  
19 2015 judgment covers them and no schedule of lawsuits attached  
20 to the judgment lists post-sale accidents as claims that were  
21 addressed or that were barred or stayed.

22           If you go to the schedules attached to the June  
23 judgment, Your Honor, the only reference is with respect to  
24 hybrid actions. Hybrid actions are post-sale accident cases  
25 that have economic losses, and the only issue with respect to



1 those economic losses were independent claims by those economic  
2 losses. It had nothing to do with the post-sale accident  
3 aspect of those hybrid cases.

4           We also contend, Your Honor, that if you look at the  
5 June judgment, in paragraphs 11(a) and 13(a), the Court makes  
6 it clear that it's not barring people from ever coming back  
7 with a due process issue if they feel that that is a basis for  
8 them being able to plead. And nothing in the June judgment  
9 dismisses any cases with prejudice. They're either stayed or  
10 they would be dismissed without prejudice. So there were no  
11 dispositive rulings made with respect to post-sale accident  
12 people in connection with April or June, Your Honor.

13           After the entry of the June judgment, two big  
14 disputes broke out. First, three economic loss complaints  
15 asserted independent claims, the State of Arizona, the State of  
16 California, and the master consolidated complaint filed in the  
17 MDL.

18           The second big dispute was with respect to the six  
19 bellwether complaints. Those were post-sale ignition switch  
20 defect accident cases that were going to trial in front of  
21 Judge Furman. Following entry of the case management order,  
22 which was an order that was issued without any notice to my  
23 clients, that was not served on my clients, the Court entered  
24 its September 3, 2015 scheduling order. That scheduling order  
25 lists categories of claims and claimants. It does not list



1 non-ignition switch defect post-sale accident cases. It does  
2 not list independent claims as defined in the April 2015  
3 decision.

4           It doesn't use the term "independent claims" anywhere  
5 in the scheduling order, and "independent claims" is a term  
6 that has been defined in the April and June orders. It became  
7 part of the vernacular of the case. And even if the term  
8 "independent claims" was not there in shorthand, the words  
9 "claims against New GM based on its own post-sale conduct" do  
10 not appear anywhere in the September 3 order.

11           In fact, nothing in the September 3 order plainly  
12 spells out that an issue to be adjudicated for post-sale  
13 accident plaintiffs without the ignition switch defect was  
14 going to be litigated with respect to due process or anything  
15 else, and if people didn't come forward, they would be forever  
16 barred. The order was silent and we believe at best ambiguous.

17           What New GM did next --

18           THE COURT: Do you agree that the -- what Judge  
19 Gerber did ultimately was modify the sale order because of the  
20 issues that were initially raised because of the ignition  
21 switch problem? So absent the modifications, would the  
22 language of the sale order bar the assertion of the claims that  
23 your clients are making now?

24           MR. WEINTRAUB: That's a great question, Your Honor.  
25 We respectfully disagree with Judge Gerber, and we think that



1 he didn't need to read the language the way he did.

2 THE COURT: But he did.

3 MR. WEINTRAUB: But he did, so for now we're -- we  
4 have to labor under that, so --

5 THE COURT: Okay. So -- and that's really my  
6 starting point. Okay. When I say "my starting point," there's  
7 a sale order. It bars lots of things. Judge Gerber modified  
8 it. It didn't seem to me it was modified in respect of the  
9 claims that your clients are asserting here. And so the issue  
10 is are you permitted now to raise the challenges that you're  
11 raising is why I come back to the letter that was sent and your  
12 clients did receive. Should they have -- and because my  
13 concern is, I mean, anybody can sit back and (indiscernible)  
14 and five years from now they come in, and even if they had  
15 notice and didn't bother coming in and raising the issues, that  
16 forever more, no matter how much time passes, people come up  
17 and say, "Oh, well, this is an independent claim; it's not  
18 barred." It seems to me that the sale order bars the claims.  
19 The issue is for due process reasons or otherwise, does the  
20 sale order have to be modified. Judge Gerber did it in the  
21 respects that we've all talked about. That's what bothered me,  
22 Mr. Weintraub.

23 MR. WEINTRAUB: I understand, and two things: We  
24 believe we're in the same constitutional boat as the people for  
25 whom the sale order was modified, and we don't believe that we



1 were given an opportunity or warned that this is your last and  
2 final opportunity to come in to court and raise due process  
3 issues. And for the reasons that I stated, and independent  
4 claims not mentioned in the scheduling order, and even if the  
5 defined term wasn't used, the words to describe what an  
6 independent claim are not in the September 3 order. So the  
7 September 3 order shows up on the doorstep of my clients. In  
8 one case it came on September 8th, which was many days later,  
9 and it was supposed to have come under the order. It was  
10 supposed to be two business days; it wasn't. It was on  
11 September 8th.

12 But be that as it may, and we think it is  
13 significant, when it showed up, they're good lawyers, they read  
14 it, they thought, well, we're asserting independent claims. We  
15 don't see where this affects us. And they reached out to  
16 General Motors and they were served with a telephone book of  
17 pleadings and said we don't understand why this relates to us.  
18 And they were met with another telephone book of pleadings or a  
19 letter that says these issues are going to be determined by  
20 Judge Gerber in upcoming pleadings.

21 It also says that designated counsel is representing  
22 you, which is not correct because these guys are not part of  
23 the MDL and there is no designated counsel for them. They  
24 didn't appear through anyone. I was not representing anyone at  
25 that hearing other than the MDL bellwether post-sale ignition



1 switch defect people. Those were my clients, not these guys.  
2 That issue was not even on my radar screen.

3 So then the question becomes, Your Honor, doing the  
4 colloquy back and forth, what were these guys told by GM? And  
5 I want to go to the letters that Mr. Steinberg put into the  
6 record as part of their motion. And here's a letter of  
7 September 4 to Mr. Butler. It's Exhibit J to their papers.  
8 And I'm obviously not going to read the whole thing because  
9 it's --

10 (Counsel confer)

11 MR. WEINTRAUB: It was received only by email on  
12 September 8th, Your Honor. I'm not going to read the whole  
13 thing, but I think that I'm not taking things out of context,  
14 and it's a long, single-spaced letter, and again people are  
15 trying to figure out why am I getting this letter? Why am I  
16 being told that I can't bring these claims? I'm not suing as a  
17 successor.

18 On page 2 of the letter: "To the extent the request  
19 for" -- and this is a letter that's stated specifically on  
20 punitive damages.

21 "To the extent the request for punitive damages  
22 contained in the pleading is based on a successor  
23 liability theory, such liabilities were not assumed  
24 by New GM, and accordingly New GM cannot be liable to  
25 the plaintiff under that theory of recovery."





1 Skipping down two paragraphs:

2 "The bankruptcy court recently issued the judgment  
3 which reiterated that, quote, 'Except for independent  
4 claims and assumed liabilities, if any, all claims  
5 and/or causes of action that the ignition switch  
6 plaintiffs may have against New GM concerning an Old  
7 GM vehicle or part seeking to impose liability or  
8 damages based in whole or in part on Old GM conduct,  
9 including without limitation on any successor  
10 liability theory are barred and enjoined pursuant to  
11 the sale order."

12 Now, what does that say? It says except for  
13 independent claims, they go through. And it says except for  
14 independent claims and assumed liabilities that the ignition  
15 switch plaintiffs may have. They're not warned --

16 THE COURT: I thought I said I don't have it in front  
17 of me. I was a bit -- you read the language quickly, but it  
18 was independent claims not based on conduct of Old GM.

19 MR. WEINTRAUB: Right.

20 THE COURT: Part of the problem we're having here is  
21 that there's not a clear pleading that says the only thing  
22 we're basing this independent claim on is the post-sale conduct  
23 of New GM.

24 (Counsel confer)

25 MR. WEINTRAUB: I'm being told that it is explicit,



1 Your Honor. I can't --

2 THE COURT: All right. Go ahead.

3 MR. WEINTRAUB: -- switch back and forth between --

4 THE COURT: Go ahead. I'm not ruling. I'm taking  
5 this under submission. I've got to go back and reread this  
6 stuff again.

7 MR. WEINTRAUB: But the point is New GM is saying  
8 whether it's completely based on New GM conduct or not, it's  
9 barred, and we don't believe that it is. And this letter, and  
10 there's more to this letter that I'll read, and Mr. Turin  
11 (phonetic) got a similar letter. It suggests that independent  
12 claims are okay. That's not the position they're taking now,  
13 and they do call it out as to ignition switch plaintiffs. But  
14 these guys are not in the matrix. They haven't taken the red  
15 pill or the blue pill. They don't know. This is a very  
16 complicated case that has taken two years to get to this point,  
17 and I'm sure as Your Honor can appreciate, trying to make sense  
18 of all of the stuff, it's not easy. And what this letter  
19 doesn't do is say, hey, you're a non-ignition switch guy. You  
20 think you have an independent claim but you don't because you  
21 have to show a due process violation which you haven't done.

22 That's not in here, Your Honor. And the letter goes  
23 on to say:

24 "To the extent the pleading requests punitive damages  
25 based on Old GM conduct, such a request is



1           prescribed."

2           Accordingly, the pleadings should be amended so it's  
3 consistent with the judgment. So, again, it's leading them to  
4 believe that if it's truly an independent claim, it's not the  
5 subject of the September 3 briefing. Mr. Steinberg is here  
6 today saying they had their opportunity to raise their due  
7 process issue on independent claims; they don't, they're out.  
8 They're out because they didn't participate in the October  
9 briefing. And what we're saying, Your Honor, is the September  
10 3 order was not clear, and this letter is affirmatively  
11 misleading.

12           And there's a similar letter. I won't read it. It's  
13 essentially the same thing from Mr. Davidson to Mr. Turner.  
14 Mr. Turner actually responds, and he responds and he says as  
15 follows, and again this is in Mr. Steinberg's submission as  
16 Exhibit Q:

17           "Second, allow this to confirm that my clients are  
18 not alleging that New GM is liable for punitive  
19 damages for any alleged conduct of Old GM."

20           Now I'll skip down a few lines:

21           "New GM then acted in a manner that should subject it  
22 to punitive damages by failing to warn and/or  
23 fraudulently concealing the defect from my clients."

24           The response from General Motors is:

25           "The issues raised in your correspondence are or will



1           shortly be before the bankruptcy court."

2           Again, not engaging on the issue. I wouldn't call it  
3 a rope-a-dope tactic to see if people are going to come in or  
4 not and try to bar them or not, but this clearly, when joined  
5 with the defects that we believe are in the September order,  
6 does not elucidate the issues in a way that meaningfully tell  
7 people you've got to show up or we're going to take the  
8 position you're out.

9           Now, Your Honor, as interesting as the run-up to the  
10 hearing set by the scheduling order are -- it provides useful  
11 background, but I want to focus on something that's equally if  
12 not more critical, which is two things. First, no one  
13 represented the interests of the post-sale non-ignition switch  
14 defect accident plaintiffs at the October 2015 hearing. As I  
15 said, my role was very limited. Mr. Weisfelner was through the  
16 MDL and only for the economic loss people. My clients did --  
17 were not part of the MDL, so no designated counsel could appear  
18 for them. No one appeared for them. No one was authorized to  
19 appear for them. No one with an attorney-client relationship  
20 with their clients appeared for them. And the issues that are  
21 particular to my client were not raised or litigated by anyone.

22           There was no summons or complaint issued in  
23 connection with the September 3 scheduling order or the follow-  
24 on hearing. No contested matter was commenced by motion that  
25 would have required them to appear as they are today because



1 now this is the fourth motion to enforce after a two-year gap  
2 from the previous ones.

3 And most importantly, Your Honor, if you look at what  
4 happened in the November 2015 decision and the December 2015  
5 judgment, we think it's clear that the Court did not  
6 permanently bar non-participating parties from ever raising due  
7 process or other objections to the sale order. There is zero  
8 language in either the November 2015 decision or the December  
9 2015 judgment that says anything other than independent claims  
10 purportedly barred under the 2009 sale order remain stayed.

11 There's no statement or ruling that parties such as  
12 my clients that had -- such as my clients had come into court  
13 and tried and failed to assert the due process arguments that  
14 we're making now, or that this --

15 THE COURT: Just come back a second. Didn't the  
16 ruling continue the stay of both ignition and non-ignition  
17 switch post-sale accident independent claims? I mean, do you  
18 agree with that?

19 MR. WEINTRAUB: I do agree with that, Your Honor,  
20 and --

21 THE COURT: So as you come in today, Judge Gerber  
22 maintained the stay in place and the issues before me are do I  
23 continue to enforce -- I mean, you didn't move and Mr. Davidson  
24 raised in his briefing, you know, they had to move under 9024,  
25 they had to do this, they had to do that. They didn't -- what



1 I have is I've got an existing sale order. I've got existing  
2 decisions from Judge Gerber. You just acknowledged he  
3 continued the stay with respect to the independent claims in  
4 effect. That's the status today. They're asking me to  
5 continue to enforce it. That's what's the procedural problem  
6 I'm having with your position.

7 MR. WEINTRAUB: Let me address that this way, Your  
8 Honor.

9 THE COURT: Okay.

10 MR. WEINTRAUB: And I'll caveat by saying if I have  
11 to come back in a different format, I will. However, the four  
12 threshold issues were teed up and addressed on the first two  
13 motions to enforce. It was in the context of those first two  
14 motions to enforce that the due process issues were raised. We  
15 were not required to file a Rule 60 motion or a 9024 motion.  
16 This was the procedure that was used in this case. In Grumman  
17 Olson, Grumman Olson was a lawsuit in New Jersey on successor  
18 liability. The buyer came into the bankruptcy court with a  
19 motion to enforce the sale order. In the context of Grumman  
20 Olson, the due process issues were raised and went up on  
21 appeal. They were ruled on by Judge Bernstein and went up on  
22 appeal and were affirmed by the district court.

23 In Manville, Manville was generated by a motion to  
24 approve a settlement and a motion for a clarifying order. In  
25 the context of that motion, Chubb objected and said no subject



1 matter jurisdiction in denial of due process. On the basis of  
2 the response to the motion, that case went to the Third Circuit  
3 three times and to the Supreme Court once. So for better or  
4 for worse, this is a recognized procedure and we felt this was  
5 not an inappropriate way to raise it.

6           Going back to what --

7           THE COURT: Maybe after the Second Circuit hands down  
8 its ruling, I'll agree with you.

9           MR. WEINTRAUB: With respect to what Judge Gerber  
10 did, and I think that footnote 70 of the November 2015 decision  
11 is very illuminating, and we also think that paragraphs 14 and  
12 29 and 30 of the December judgment are very illuminating. I  
13 can take the time to read them --

14           THE COURT: I've written them down and I will go back  
15 and look at them --

16           MR. WEINTRAUB: Okay. You spare us both, Your Honor.  
17 So our position is that what Judge Gerber said in footnote 70  
18 is basically unless and until somebody comes in with a due  
19 process issue, you're stayed. He doesn't say, "Hey, guess  
20 what, you're all done, so I don't have to think about this  
21 anymore."

22           In paragraph 14 of the December judgment, the judge  
23 says, "These claims are stayed." And he cites to the sale  
24 order, the April decision, and the June judgment. He does not  
25 cite to his own November decision. He does not say, "You're



1 out, you're out, you're out, you're done." I think it's very  
2 significant that he only relied upon what he had done earlier  
3 because, as we spoke about earlier, the April decision and the  
4 June judgment were limited to the four threshold issues with  
5 respect to the ignition switch defect people, and then you've  
6 got the roadmap as to what's not stayed and what's stayed,  
7 again no dispositive ruling.

8           Going to the issues that we think are live, which  
9 would be the constitutional issues, to the extent as had the  
10 colloquy about earlier that you can even read those provisions  
11 of the sale order as barring independent claims against New GM,  
12 my clients are in the same constitutional boat, as I said  
13 earlier, as the ignition switch defect economic loss  
14 plaintiffs. Just as Judge Gerber ruled when he looked at that  
15 language, five years later in 2015, that he exceeded his  
16 authority by ostensibly prospectively releasing people who  
17 had --

18           THE COURT: In order for there to be a constitutional  
19 due process defect, do you have to establish that Old GM had  
20 knowledge of the specific defects that are alleged in these  
21 complaints?

22           MR. WEINTRAUB: No, I don't believe I do, Your Honor.  
23 I think that that's a horse of a different color, and that  
24 issue came up with respect to known versus unknown creditors of  
25 Old GM. We're talking about people who have independent claims





1 against New GM, and it wouldn't have anything to do with  
2 whether or not they were --

3 THE COURT: It's just purely New GM conduct.

4 MR. WEINTRAUB: Yes.

5 THE COURT: You've got -- so nothing in any of the  
6 pleadings should be read as seeking to establish liability for  
7 New GM based on any conduct pre-sale of Old GM. Is that  
8 correct?

9 MR. WEINTRAUB: That's right. It would be added --

10 THE COURT: It's not the 24 employees or however many  
11 employees came over to New GM and whether their knowledge is  
12 attributable --

13 MR. WEINTRAUB: No, that's a different issue, Your  
14 Honor. I think that that isn't --

15 THE COURT: I just want to know whether you're --

16 MR. WEINTRAUB: Yes.

17 THE COURT: Whether in Fox, the plaintiff is seeking  
18 to rely upon any conduct, pre-sale conduct by Old GM, because  
19 that was where I was getting hung up because it seemed to me --

20 MR. WEINTRAUB: That's --

21 THE COURT: -- that they're trying -- you're trying  
22 to straddle that and you're not relying on --

23 MR. WEINTRAUB: But that's --

24 THE COURT: Let me -- don't interrupt. When I'm  
25 speaking, don't interrupt.



1           It seemed to me that the Fox plaintiffs are seeking  
2 to straddle this issue and rely on and prove conduct of Old GM  
3 as a basis for establishing purported liability for independent  
4 claims for New GM. Am I incorrect?

5           MR. WEINTRAUB: What Judge Gerber ruled --

6           THE COURT: No, tell me whether -- I don't want to  
7 know what Judge Gerber ruled. My question is specifically in  
8 Fox, under the existing pleadings, that plaintiffs seeking to  
9 rely in any respect on conduct -- pre-sale conduct of Old GM or  
10 its employees in asserting the supposed independent claims  
11 against New GM, yes or no?

12           MR. WEINTRAUB: I'll answer that in two ways. First  
13 I would need to actually speak to the person who was trying to  
14 talk to me. But with respect to knowledge, knowledge that was  
15 acquired by virtue of buying the books and records of Old GM,  
16 knowledge that was acquired by acquiring the transferred  
17 employees who brought that knowledge with them. Judge Gerber  
18 has ruled that that knowledge, which would give an awareness to  
19 New GM, which in turn would have given it an obligation to act  
20 or warn or not act or do something, that's fair game.

21           THE COURT: You can do that in the context of the  
22 ignition switch defect which, by the time he ruled, was  
23 established that old GM knew about. That's why I ask whether  
24 is there an -- I don't know what -- you know, is it alleged  
25 that old GM knew of the defects that are alleged in Fox? Okay.



1 I didn't -- you know, I think you're being -- we're -- I'm  
2 concerned, Mr. Weintraub, that I am being misled about -- well,  
3 I'm serious about this, though I had understood you earlier to  
4 say that the independent claims against New GM are based solely  
5 on pre-sale conduct by New GM, and now you decline to answer my  
6 question, I think, that called for a yes or no answer as to  
7 whether the plaintiffs in Fox are seeking to plead and prove  
8 the supposed independent claim against New GM based on any  
9 conduct or knowledge by old GM. You haven't answered that, but  
10 what I got was a mushy answer, not a clear answer. I asked for  
11 a yes or no and I didn't get it.

12 MR. WEINTRAUB: The reason I can't answer yes or no  
13 is because the conduct is separate from the knowledge in the  
14 sense that the knowledge clearly, if it was developed at Old  
15 GM, it moved over to New GM. So to say that you failed to warn  
16 because you were aware of a defect and the awareness of that  
17 defect is based upon you having inherited the knowledge of the  
18 product managers and the lawyers and the other employees, I  
19 don't think that's based upon old GM conduct.

20 THE COURT: Well, it's -- you're opening Pandora's  
21 box because an issue of the ignition switch, by the time Judge  
22 Gerber decided, it was pretty well established that Old GM had  
23 knowledge, and that's not the case that's been presented to me  
24 here.

25 MR. WEINTRAUB: But I think there's an easy answer to



1 that, Your Honor, and Judge Gerber has given us that answer,  
2 which is GM has all of its defenses. If it says, we didn't  
3 know, we didn't know because Old GM didn't know, or we didn't  
4 know because that was in somebody's file drawer and nobody ever  
5 looked for it, so we never became aware that it was in our  
6 files, that's part of their defenses. And Judge Gerber  
7 expressly, expressly ruled that that's an issue for the state  
8 court or the non-bankruptcy court judge, that once the issue of  
9 independent claims gets through the gate, and he did rule that  
10 imputation also gets through the gate, the question of whether  
11 or not GM was actually aware because of independent knowledge,  
12 that's part of their defense to the lawsuit and that's  
13 something that the non-bankruptcy court is determining. So  
14 when the Court says to me if they had -- if they are using  
15 knowledge that was developed by Old GM to say that there was a  
16 failure to warn post-sale and that's barred, I -- and that's  
17 using Old GM knowledge --

18 THE COURT: Well, let me --

19 MR. WEINTRAUB: -- I don't agree.

20 THE COURT: Let me say one thing. So I understand  
21 what you're telling me now that the plaintiffs in Fox are  
22 seeking to base their supposed independent claim upon the  
23 conduct or knowledge of Old GM, correct?

24 MR. WEINTRAUB: You know, I've got to tell Your  
25 Honor --



1 THE COURT: Is that a yes, that you can answer?

2 MR. WEINTRAUB: That's a no. That's a no because I  
3 don't agree with your premise. I don't agree that when New GM,  
4 aware of the defect, fails to warn, that that's conduct of Old  
5 GM. That's conduct of New GM. New GM is the one with the duty  
6 to warn, and the fact that they aren't --

7 THE COURT: And your belief is that you believe that  
8 the plaintiffs can prove that Old GM had knowledge of the  
9 defect, I assume, in the position that have been -- they had a  
10 duty to warn and they didn't. Meanwhile, they're trying to  
11 carry out Old GM -- yeah, New GM came into existence and  
12 whatever knowledge Old GM had is imputed to New GM, and  
13 therefore it had a duty to warn.

14 MR. WEINTRAUB: No, we're not saying that whatever  
15 knowledge they had is imputed. Imputation, as Judge Gerber  
16 said, is a question of fact. And we are not saying that  
17 there's automatic imputation. Judge Gerber didn't say there  
18 was automatic imputation, but what he did say is if you can  
19 show that people at New GM were aware of information developed  
20 at Old GM, and if you can show that based upon that awareness  
21 there was a duty to act and that's culpable, then that's  
22 something that the state court can decide.

23 And New GM has all of their defenses with respect to  
24 that, so the action and the independent claim is based upon  
25 assuming they have the knowledge. What did they do with the



1 knowledge? If they did nothing with the knowledge and people  
2 were killed because they did nothing with the knowledge, that's  
3 a culpable act, Your Honor. And that's not based upon Old GM  
4 conduct. That's based upon New GM deciding we're not going to  
5 tell people about the defect even though we know about it.

6 THE COURT: Okay. Go ahead with your argument.

7 MR. WEINTRAUB: Can I just confer with counsel? He's  
8 trying to say something.

9 THE COURT: Yes.

10 (Counsel confer)

11 MR. JAMES: Judge, may the drafter of the pleading be  
12 heard?

13 THE COURT: Yeah, identify yourself for the record.

14 MR. BUTLER: James E. Butler, Jr. May the drafter of  
15 the pleading be heard and respond to the Court's questions?

16 THE COURT: Go ahead, Mr. Butler.

17 MR. BUTLER: Yes, sir. I typed this with my own  
18 fingers after going back and forth with the GM counsel about it  
19 several times. The only claim at issue with respect to my  
20 client, Ms. Fox, is failure to warn against New GM for New GM's  
21 post-bankruptcy conduct -- based on New GM's post-bankruptcy  
22 conduct. It's Count 3 on page 20 of the filed second recast  
23 amended complaint that was provided to Your Honor by  
24 Mr. Weintraub on Friday. And there are three operative  
25 paragraphs in Count 3. Paragraph 49 says:



1 "GM, LLC did, in fact, foresee, based upon its own  
2 knowledge after the bankruptcy sale, the occurrence  
3 of rollover events."

4 Paragraph 50:

5 "Based upon its own knowledge after the bankruptcy  
6 sale, GM, LLC owed a duty to the consuming public in  
7 general," et cetera.

8 Paragraph 51:

9 "GM, LLC knew after the bankruptcy sale about the  
10 danger of the roof of the 2004 through 2009 Cadillac  
11 SRX."

12 The only allegations, failure to warn allegations,  
13 made against GM, LLC are based upon GM, LLC's own knowledge and  
14 own conduct after the sale.

15 THE COURT: May I ask you this, Mr. Butler? What  
16 facts are you relying on in support of the allegation that New  
17 GM had knowledge of the rollover danger? I mean, I -- you --

18 MR. BUTLER: I didn't hear the first part of the  
19 Court's question. I'm sorry.

20 THE COURT: What are the fact -- your pleading made a  
21 standing state law of pleading requirements that the allegation  
22 appears conclusory to me. And my question is on what facts do  
23 you rely upon in supporting the allegation that New GM had  
24 knowledge of the rollover danger with the vehicle at issue?

25 MR. BUTLER: I think two different --



1 THE COURT: Because you're supposed to go trial in  
2 September, so you ought to know that by now.

3 MR. BUTLER: I do. I do know that, Your Honor --

4 THE COURT: Okay.

5 MR. BUTLER: -- respectfully. Two different  
6 categories. One is the sworn testimony of three GM engineers -  
7 - four GM engineers, including the two GM engineers as lead  
8 design engineers for the roof, the 2004 through 2009 Cadillac  
9 SRX and its successor vehicle. All three of -- or four of  
10 whom, including those two lead design engineers, worked for Old  
11 GM on June 24 and for New GM on June 25, 2009. And also the  
12 admission by New GM that all of the knowledge of the employees  
13 it retained and all the books and records that were possessed  
14 by Old GM were obtained by New GM the day after the bankruptcy  
15 sale, which would include the knowledge of those engineers and  
16 all the books and records.

17 The fact that of all the vehicles ever made by  
18 General Motors, any General Motors, the lead design roof  
19 engineer for the Cadillac SRX testified under oath that this  
20 particular vehicle had rolled over more often at GM's proving  
21 grounds than any other vehicle he'd ever -- that he'd known  
22 about. One of those rollovers was identical to the rollover my  
23 client was rendered a quadriplegic in. Her rollover was nine  
24 years later. All of those engineers' knowledge of what Old GM  
25 knew continued to work for New GM. They were deposed as





1 employees/engineers of New GM.

2 In addition to that, and this gets -- I can go on for  
3 a long time. This can get pretty technical. The New GM  
4 started -- my client was injured in a 2004 Cadillac SRX. New  
5 GM started redesigning the roof on that vehicle in early 2006  
6 as a result of rollover rates of that vehicle at GM's own  
7 proving grounds in 2004 -- 2005 -- 2004.

8 THE COURT: What was the date of the Fox accident?

9 MR. BUTLER: November 12, 2013. GM started  
10 redesigning the roof in early 2006 as a result of the wrecks at  
11 the proving grounds. Though that redesign continued by Old GM,  
12 it was continued and finished by New GM. The reason for the  
13 redesign was to make it about three times -- the roof about  
14 three times stronger, which they did. New GM continued that  
15 process. New GM, however, continued to sell the old SRX with  
16 the weak roof even after the bankruptcy, and that's not in  
17 doubt.

18 So New GM had the books, records, had the knowledge  
19 of the employees, continued the process of producing the same  
20 car with a three times stronger roof after bankruptcy, but kept  
21 selling the car with the old weak roof after the bankruptcy.  
22 So there's literally nothing that Old GM knew that New GM  
23 didn't know or did not continue.

24 But having said that, we do have a count, a claim  
25 against Old GM for its failure to warn. That's Count 4. We



1 have a totally separate count against New GM for its failure to  
2 warn. And as I just read, I don't know I could have drafted it  
3 -- it may be conclusory, but it's binding on us. It says:

4 "Our claim -- our failure to warn claim against  
5 New GM is based solely upon its own knowledge after  
6 the bankruptcy sale."

7 THE COURT: Okay. Thanks very much, Mr. Butler.

8 MR. BUTLER: Thank you, Your Honor.

9 THE COURT: Mr. Weintraub.

10 MR. WEINTRAUB: Thank you, Your Honor. I think -- I  
11 don't want to belabor this anymore. I think it's a semantic  
12 argument, but I think it's distinctual, the difference in our  
13 view is that once it becomes aware of Old GM knowledge, it  
14 becomes New GM knowledge.

15 I think we've already spoken about why we think  
16 Manville and Melane (phonetic) are relevant on the due process  
17 issue. There was nothing in the notice that would have tipped  
18 people off. Judge Gerber didn't see anything in the sale  
19 motion that would have tipped him off and then five years later  
20 when he revisited it, he knew that he had gone too far.

21 We explained why we think Grumman Olson is  
22 appropriate here and I think precedent in the sense that even  
23 though it is a successor line that litigates, we don't quibble  
24 with that, that the issue there was, how do you bind people who  
25 have not yet been injured.



1 THE COURT: Are you representing the plaintiffs who  
2 are opposing the motion that's coming out on July 18th? Am I  
3 going to see you again on July 18th?

4 MR. WEINTRAUB: I haven't checked my emails yet, Your  
5 Honor. We had spoken to some people who had gotten letters. I  
6 don't know if they're in that --

7 THE COURT: All right.

8 MR. WEINTRAUB: -- bucket.

9 THE COURT: Okay.

10 MR. WEINTRAUB: I might be here again.

11 THE COURT: Okay.

12 MR. WEINTRAUB: We don't think that Campbell is  
13 applicable. Campbell was an appeal that was based upon the  
14 arguments that the bankruptcy court couldn't sell free and  
15 clear of successor liability under 363(f). You know, that's a  
16 hot issue. I think, you know, in this circuit, especially with  
17 what was done in Chrysler, and General Motors had some dicta in  
18 the Chrysler opinion, you could do that.

19 THE COURT: Well, the Chrysler opinion certainly says  
20 you can do it, and the circuit opinion left out the issue about  
21 the post-sale personal injury claims, and that's, you know --

22 MR. WEINTRAUB: Exactly, so that's --

23 THE COURT: -- the part we're doing.

24 MR. WEINTRAUB: That's right, but my point with  
25 respect to that is Campbell didn't deal with independent

1 claims.

2 THE COURT: Right.

3 MR. WEINTRAUB: And certainly not with future issues  
4 like this one, which as Your Honor has said, the Second Circuit  
5 wouldn't even go that far and barred those future claims.

6 THE COURT: Right.

7 MR. WEINTRAUB: I'd be repeating myself, Your Honor.  
8 I think that, you know, what I said in the beginning hit a lot  
9 of the issues that I was going to hit in my representation, so  
10 if I could just summarize.

11 THE COURT: Go ahead.

12 MR. WEINTRAUB: We don't believe that anything that  
13 occurred under the four threshold issues briefing involved or  
14 affected my clients who are post-sale accident plaintiffs. We  
15 think that Judge Gerber held that predicates to assertion of an  
16 independent claim are a due process violation in connection  
17 with the notice of the 2009 sale hearing, and prejudiced by  
18 virtue of being deprived of a claim. We think we hit both the  
19 lack of notice and the prejudice.

20 We don't believe that any proceeding in the  
21 bankruptcy court since 2009 has compelled my clients to come  
22 forward and address the issues that I addressed today. We  
23 don't think anything ever clearly said to us that we would be  
24 permanently barred. We don't think that what actually happened  
25 in the decisions and the judgment permanently barred us, so we



1 think that now is an appropriate time.

2 We don't think that collateral estoppel applies for  
3 the obvious reason that we were not here, not represented,  
4 never had an opportunity to litigate the issues. And we think  
5 that a dispositive ruling on a scheduling order that didn't  
6 compel us to come here and was we think, to be kind, ambiguous,  
7 didn't use the magic words, didn't even describe the thing that  
8 was being sought would deny us again of due process if we were  
9 permanently barred from raising these issues.

10 And with that, Your Honor, I'll --

11 THE COURT: Okay. Thank you.

12 MR. WEINTRAUB: -- thank you for your time.

13 THE COURT: Thank you, Mr. Weintraub. Hang on,  
14 Mr. Steinberg. We've got -- Mr. Steel.

15 MR. STEEL: Good afternoon, Your Honor. Howard  
16 Steel, Brown Rudnick, designated counsel for the ignition  
17 switch plaintiffs and certain non-ignition switch plaintiffs.

18 Real quick, our view is that the Second Circuit  
19 decision will be dispositive of the independent claim  
20 jurisdiction issue. And then also to clarify for the record,  
21 we do agree with Mr. Weintraub on the scope of our role in the  
22 August and November proceedings. Mr. Weisfelner clearly  
23 articulated that he was designated counsel for the economic  
24 loss plaintiffs. Our authority emanates from the MDL  
25 leadership's authority. We can't represent the state court



1 claims before you.

2 And just last, if Your Honor does choose to address  
3 independent claims, I went back through and I think a good  
4 framework or point of reference is not 1301, but Your Honor's  
5 1031 Tax Reporting Group decision. Swap in "direct" for  
6 "independent" and then you look at Judge --

7 THE COURT: McHale v. Alvarez, is that -- on indirect  
8 or derivative claims, is that the --

9 MR. STEEL: That's the one I'm referring to. And  
10 Judge Holwell (indiscernible) and he actually goes through  
11 Manville and then he uses the actual language that these are  
12 independent non-derivative claims that don't affect the rest of  
13 the bankruptcies. And that's the argument that's in front of  
14 the Second Circuit that I think will be dispositive, Your  
15 Honor.

16 THE COURT: Yeah, I mean, look, one of the -- still  
17 one of the things that's bothering me, and Mr. Weintraub and  
18 Mr. Butler have addressed it, it's one thing to label something  
19 independent claim and then to try and bootstrap it by arguing  
20 based on Old GM conduct, is it really an independent claim at  
21 that point? I understand Mr. Weintraub's argument. I'm not  
22 trying to -- and I'm not deciding it now, but that's one of the  
23 things that's bothering me about it.

24 Okay. Anything else, Mr. Steel?

25 MR. STEEL: No, Your Honor.



1 THE COURT: Okay.

2 MR. STEEL: Thank you for the time.

3 THE COURT: So is anybody -- is someone arguing on  
4 behalf of Chapman and Tibbetts?

5 MR. WEINTRAUB: Is that --

6 THE COURT: Mr. Weintraub, your arguments apply to  
7 them as well?

8 MR. WEINTRAUB: Yes, Your Honor.

9 THE COURT: Let me just -- before you get back up,  
10 Mr. Steinberg, I mean, with respect to Chapman and Tibbetts,  
11 the situation -- GM's position it seems to me is much clearer  
12 with respect to Chapman and Tibbetts because the complaint  
13 alleges that New GM is a successor of Old GM and that's already  
14 been decided. It argues -- it tries to distinguish between Old  
15 GM and New GM, and it alleges that New GM manufactured or  
16 designed Old GM vehicles or performed other conduct relating to  
17 Old GM vehicles before the entry of the sale order. I mean,  
18 that seems to me quite clear that Chapman and Tibbetts --  
19 whatever I decide about independent claims, Chapman and  
20 Tibbetts just don't pass muster under the -- under a part of  
21 Judge Gerber's rulings that you have not challenged. Do you  
22 dispute that?

23 MR. WEINTRAUB: Your Honor, clearly, they are not a  
24 successor per the ruling, and I'll speak with counsel about  
25 that.



1 In terms of historical facts, you know, there  
2 happened to have been an Old GM before there was a New GM, and  
3 I don't think you're barred from ever uttering those words.  
4 It's what --

5 THE COURT: Well, this is one of the few issues that  
6 I've already had to decide in GM. I did have the published  
7 opinion because it involved a Georgia -- I can't remember,  
8 Mr. Steinberg, what case that was, but --

9 MR. STEINBERG: (Indiscernible).

10 THE COURT: Yeah. So that's easy to fix, but,  
11 nevertheless, it's in there and it's defective. All right. I  
12 just wanted to be sure. Okay.

13 MR. WEINTRAUB: I guess the only thing I would add,  
14 Your Honor, is in terms of knowledge, imputation, and all of  
15 that, if the Court has not already read it, I would guess you  
16 did, but the November 2015 decision goes through that --

17 THE COURT: I've read everything at least once, some  
18 of it more than once. I need to go back and read again, but  
19 I'm not going to -- I'm going to hear Mr. Steinberg, but I'm  
20 not going to rule today. Again, they're going to be up on July  
21 18th, and I'm going to wait and hear the July 18th hearing  
22 before I'm going to rule on what's today. I don't want to  
23 foreclose arguments that are made on July 18th.

24 But I've already said that, I mean, one of the things  
25 I'm very seriously contemplating is maintaining a stay in place





1 until the Second Circuit rules and then giving everybody a  
2 chance to come back and tell me how the Second Circuit does or  
3 does not resolve the issues.

4 In terms of Mr. Butler's case, that may mean he isn't  
5 going to trial in September because I don't know when the  
6 Second Circuit is going to decide very important, complicated  
7 issues. It may be sooner and it may not, so -- but let me hear  
8 from Mr. Steinberg and then we'll --

9 MR. STEINBERG: Thank you, Your Honor.

10 THE COURT: Okay.

11 MR. STEINBERG: I know I've said this before, but I  
12 think the due process issue in front of the Second Circuit is  
13 different than the issue --

14 THE COURT: Well, it may be, and when I get to read  
15 what the Second Circuit says, it may clarify things for me and  
16 -- but it's not like I'm waiting -- I would be waiting on  
17 something that hasn't been briefed, hasn't been argued. It  
18 was.

19 And, Mr. Steinberg, I would like you to send me the  
20 transcript of the argument. I haven't seen it. I certainly  
21 read some of the commentary after the argument, but I haven't  
22 read the argument itself and I would like to see that. It's --  
23 but obviously what counts is what they rule.

24 Thanks, Mr. Weintraub.

25 Mr. Steinberg, go ahead.

1 MR. WEINTRAUB: I just actually remembered one other  
2 point that I wanted --

3 THE COURT: Sure.

4 MR. WEINTRAUB: -- if it's okay, Your Honor. One of  
5 the things Mr. Steinberg said was that I argued due process in  
6 February of 2015. And the due process issue that I argued  
7 there was with respect to successor liability, not with respect  
8 to independent claims. It was clear on the transcript excerpt  
9 that I repeatedly said successor liability. And if the Court  
10 would look at our brief, which you could take judicial notice  
11 of, the section in the brief, the lead-in paragraph says this  
12 is a distinct argument from independent claims.

13 THE COURT: All right. Thank you.

14 Mr. Steinberg.

15 MR. STEINBERG: Your Honor, I thank you for your  
16 patience so far and I will try to be brief, although there is  
17 much to respond, including the very last thing that Mr.  
18 Weintraub said, which is that my argument, and I think the  
19 transcript will bear out, is that he made the Grumman Olson  
20 argument at the October 2015th hearing.

21 The second thing is, is that no one who participated  
22 in that October hearing thought we were talking about whether  
23 punitive damages were assumed only in the context of vehicles  
24 with the ignition switch defect --

25 THE COURT: Well, just let me stop you there.



1 They've taken the punitive damages out. All right? They've  
2 agreed in that.

3 MR. STEINBERG: They have in Fox --

4 THE COURT: Right.

5 MR. STEINBERG: -- but not in Chapman and Tibbetts.

6 THE COURT: Okay. Well, Chapman and Tibbetts have  
7 got other problems I've already identified.

8 MR. STEINBERG: All right. So --

9 THE COURT: Fox is the more immediate issue because  
10 of Mr. Butler's September trial date.

11 MR. STEINBERG: So if you read the brief filed by  
12 Mr. Weintraub, and even in his oral argument today, he builds  
13 on a false premise, which is that the April 15th decision in  
14 2015 and the June judgment didn't deal at all with the non-  
15 ignition switch plaintiffs, that it solely dealt with ignition  
16 switch -- vehicles with the ignition switch defect.

17 If you go to page 6 of his brief, he specifically  
18 lists the issues covered by the April 15th decision, what was  
19 dealt with. Non-ignition switch plaintiffs is listed there  
20 contradicting in his words the oral argument that he's made --

21 THE COURT: Let me ask you this, Mr. Steinberg. In  
22 order for you to bind Fox, wouldn't you have to have brought  
23 Fox into a proceeding by either serving an adversary complaint,  
24 or I don't know whether you could simply do it through a  
25 contested matter, but it's not a -- it strikes that you never



1 sent them the letter. They haven't disputed that they got a  
2 letter, they disputed as to what the letter meant and  
3 everything, but you don't initiate process to bring parties  
4 into a court proceeding simply by sending them a letter.

5 If -- and you don't really -- you haven't really  
6 argued that an agency theory that they're bound. If you want  
7 to make them bound by Judge Gerber's prior rulings, don't you  
8 have to have established they might be able to bind you because  
9 there's no mutuality of -- for collateral estoppel after  
10 Blonder Tongue years ago, but you're trying to bind them. And  
11 can you do that?

12 MR. STEINBERG: Yes.

13 THE COURT: How?

14 MR. STEINBERG: Because I'm not look -- I'm looking  
15 to enforce an existing injunction and --

16 THE COURT: And that was part of my point about --  
17 yes. I mean, I -- my starting place is, there's an injunction.  
18 Okay? And it has to be an order -- unless -- well, Mr.

19 Weintraub and I have had a discussion about whether  
20 procedurally how they can -- can they do it in opposition to a  
21 motion to enforce. And maybe they can. Okay?

22 MR. STEINBERG: Well, Your Honor, we actually have  
23 this issue in connection with the April decision, which is that  
24 it was all teed up by a motion to enforce. One of the  
25 arguments made by Mr. Peller is that you needed to do it by



1 adversary proceeding. Judge Gerber ruled that the motion to  
2 enforce was appropriate.

3           So then -- so we had the concept that you can do this  
4 by a motion to enforce. We were reacting to the judge's status  
5 order in August when he said, I want to decide all the other  
6 issues; I want recommendations from the counsel how to decide  
7 all the issues that are pending on all the other cases, and he  
8 was specific about also dealing with the -- without the  
9 ignition switch defect. He said, Counsel, write to us and tell  
10 -- write to me and give me what your concerns are. He had a  
11 status conference on August 31 and he issued the September 3  
12 hearing -- the September 3 case management order --

13           THE COURT: Scheduling order, yeah.

14           MR. STEINBERG: -- scheduling order. The scheduling  
15 order blessed a letter that I had drafted, which would bring in  
16 all the other parties. And that letter was actually reviewed  
17 by Mr. Weintraub with his -- whatever hat he thought he was  
18 wearing at that time and was reviewed by other counsel. They  
19 all passed on the letter. Judge Gerber, when he was ruling,  
20 was ruling on the issue, which is that he invited to -- who  
21 wanted to participate that they could participate, they could  
22 come in and file whatever pleading they wanted to see, that  
23 they otherwise -- otherwise, they were going to be bound by his  
24 rulings. And that's in the letter that he had approved and  
25 said that I should sent out to everybody. So that was the



1 process upon which we were going.

2 THE COURT: Mr. Weintraub argues that the letter  
3 isn't clear as to what effect it had on non-ignition switch --

4 MR. STEINBERG: The letter --

5 THE COURT: -- plaintiffs.

6 MR. STEINBERG: The letter was absolutely clear and I  
7 was going to start with the first part, which is that it builds  
8 on the false premise --

9 THE COURT: Pardon me though. You've got all the  
10 stuff in front of you. Give me the language in the letter that  
11 you believe makes it clear that procedure applied to non-  
12 ignition switch plaintiffs. Mr. Weintraub disputes it.

13 MR. STEINBERG: It you have any --

14 THE COURT: He's read portions of it to me, so you're  
15 going to -- you're --

16 MR. STEINBERG: I think Mr. Weintraub read you only a  
17 portion --

18 THE COURT: I know, that's --

19 MR. STEINBERG: -- of my letter.

20 THE COURT: -- why I'm asking you to do it. Okay?

21 MR. STEINBERG: I'm going to read to you the letter  
22 that was approved that was contained -- that I was allowed to  
23 send pursuant to the September --

24 THE COURT: Yes.

25 MR. STEINBERG: -- 3 scheduling order. It says --



1 MR. WEINTRAUB: Which letter?

2 THE COURT: He's going --

3 MR. STEINBERG: Please.

4 THE COURT: -- to tell you that. Okay?

5 MR. STEINBERG: Which it's the letter that was  
6 sent --

7 THE COURT: Give him the date and --

8 MR. STEINBERG: It was the letter that was sent out  
9 in conjunction with the scheduling order. And the scheduling  
10 order -- I'm reading that from the scheduling order.

11 MR. WEINTRAUB: I'd like to know what letter.

12 THE COURT: Okay. Let him read from the scheduling  
13 order, Mr. Weintraub.

14 MR. STEINBERG: I'm reading from the --

15 THE COURT: Just wait.

16 MR. STEINBERG: -- scheduling order on page 4 of the  
17 September 3 scheduling order, which is Exhibit I to my motion.  
18 He says that I can send out this letter with a cover note that  
19 states as follows:

20 "General Motors previously served you with a band  
21 letter in connection with a lawsuit commenced by you  
22 against New GM which sets forth that certain  
23 deadlines for filing pleading with the bankruptcy  
24 court as defined therein with the band letter."

25 I think Tibbetts got their demand letter before this



1 -- the hearing and then Chapman got it before the September 30  
2 hearing. The order and Fox had their letter sent the next day.

3 "The attachment is a scheduling order attached by the  
4 bankruptcy court on September 3. Please review the  
5 scheduling order, as it modifies the time periods set  
6 forth in the demand letter for filing certain  
7 pleadings with the bankruptcy including, without  
8 limitation, the 17 business days to respond to the  
9 demand letter.

10 "If you have any objections to the procedure set  
11 forth in the scheduling order, you must file  
12 objections in writing with the bankruptcy court  
13 within three business days of receipt of this notice;  
14 otherwise, you will be bound by the terms of the  
15 scheduling order and the determinations made pursuant  
16 thereto.

17 "If you believe there are issues that should be  
18 presented to the court relating to your lawsuit that  
19 will not otherwise be briefed and argued in  
20 accordance with the scheduling order, you must set  
21 forth that position with specificity in your  
22 objection. The court will decide whether a hearing  
23 is required with respect to any objection timely  
24 filed; and if so, will promptly notify the parties  
25 involved."





1 THE COURT: Okay. Wait, let me come back and ask,  
2 that's the notice and what Mr. Weintraub read to me from a  
3 letter which he said did not identify the non-ignition  
4 switch --

5 MR. STEINBERG: He stopped reading --

6 THE COURT: I know, so you're going to --

7 MR. STEINBERG: I'm going to give you that.

8 THE COURT: You're going to give me that.

9 MR. STEINBERG: I'm going to give you that.

10 THE COURT: And you're going to identify the date of  
11 the letter and --

12 MR. STEINBERG: It's the September 4th letter to Mr.  
13 Butler.

14 THE COURT: And where can I find that?

15 MR. STEINBERG: And that's on Exhibit J of my motion.

16 THE COURT: Okay.

17 MR. STEINBERG: And Mr. Weintraub was reading on  
18 page 2, the last paragraph there, but he stopped reading. So  
19 I'll put it in context.

20 THE COURT: Read the whole paragraph.

21 MR. STEINBERG: Okay. It says:

22 "The bankruptcy court recently issued the judgment  
23 which reiterated that, quote, 'except for independent  
24 claims and assumed liabilities, if any, all claims  
25 and causes of action that the ignition switch



1 plaintiffs may have against New GM concerning an Old  
2 GM vehicle or part seeking to impose liability or  
3 damages, based in whole or in part on Old GM conduct,  
4 including, without limitation, on any successor  
5 liability theory recovery, are barred and enjoined  
6 pursuant to the sale order,' citing to the judgment  
7 and the decision."

8 And there's a parenthetical which quotes from the  
9 decision and that's where he stopped. The next sentence:

10 "The reasoning and ruling set forth in the judgment  
11 and decision are equally applicable to the lawsuit"  
12 -- which is the -- his lawsuit. That's -- "to the  
13 extent that the pleadings request punitive damages  
14 based on Old GM conduct, such a request is  
15 proscribed. Accordingly, the pleadings should be  
16 amended so that it's consistent with the rulings, and  
17 the judgment decision, and the sale order, and  
18 junction.

19 "While the judgment provides" -- "provided procedures  
20 for amending pleadings that violated the judgment,  
21 decision, and sale order, and injunction, or filing a  
22 pleading with the bankruptcy court, if you have a  
23 good faith basis to maintain that your pleadings  
24 should not be amended, the bankruptcy court, on  
25 September 3, entered a scheduling order which



1 contains procedures that supercede the procedures set  
2 forth in the judgment. A copy of the scheduling  
3 order is attached hereto as Exhibit C. Please  
4 consult the scheduling order for the procedures that  
5 apply to this matter."

6 THE COURT: Okay. And what you read me did not, in  
7 specific words, identify non-ignition switch claims as being  
8 subject to the letter and the scheduling order. Am I correct?

9 MR. STEINBERG: What I read was, is that I quoted  
10 from his decision that said independent claims placed on Old GM  
11 conduct by reason of the court's other -- I'm sorry. When he  
12 quoted from the decision, the quote that was there said:

13 "Claims premised in any way on Old GM conduct are  
14 properly prescribed under the sale agreement and the  
15 sale order, and by reason of the court's other  
16 rulings, their prohibitions against the assertions of  
17 such claims stand."

18 And the next sentence says:

19 "The reasoning and ruling set forth in the judgment  
20 and decision are equally applicable to the lawsuit."  
21 Meaning, his lawsuit.

22 The other thing that --

23 THE COURT: They got Mr. Fox or Miss -- I don't know,  
24 Fox's counsel got a letter that both referred -- and it's a  
25 non-ignition switch case, and it has a letter -- got a letter



1 that says this is -- you know, I've got a bunch of rulings on  
2 the ignition switch cases, but the reasoning applies to your  
3 lawsuit as well. That's --

4 MR. STEINBERG: Correct.

5 THE COURT: That's your position.

6 MR. STEINBERG: The other thing, Your Honor, is that  
7 the MDL has various liaison counsel, including liaison dealing  
8 specifically with state court plaintiffs. They have someone  
9 who just -- he -- they have the people that you call and ask a  
10 question on the defense side if you want to know what should  
11 happen here. So the notion that they were relying on me to  
12 give greater advice of how they should defend a demand letter  
13 that I have is rather unusual.

14 The thing that I wanted to say from the beginning is  
15 that Mr. Weintraub's premise, which is that the August -- that  
16 the April decision and the June judgment had nothing to do with  
17 non-ignition switch defects besides what he wrote in his brief,  
18 to say to the contrary. He's actually contradicted by MDL  
19 counsel. The three-page pleading that they filed with Your  
20 Honor was a reminder that -- which we disagree with, but is a  
21 reminder that issues relating to non-ignition switch defects  
22 are on appeal to the Second Circuit.

23 THE COURT: Well, Mr. Steel tells me that he believes  
24 the Second Circuit decision is going to be dispositive of the  
25 issues I have before me today.



1 MR. STEINBERG: Right, so --

2 THE COURT: Mr. Steel just said that.

3 MR. STEINBERG: So he himself, although, he didn't  
4 want to say it as being contrary to Mr. Weintraub, actually  
5 filed the pleading that was contrary to Mr. Weintraub's  
6 fundamental assertion because then he builds on that false  
7 premise. He says that because the April and June decisions  
8 didn't deal with non-ignition switch defects, there was no  
9 intention to try to deal with these otherwise.

10 To get there, you have to ignore Judge Gerber's  
11 statement saying I'm particularly concerned -- his statements  
12 to Mr. Weisfelner that says, you know, you have some of your  
13 guys that aren't doing. Mr. Weisfelner is saying that I will  
14 deal with it. And me dealing with briefing -- and if you read  
15 the briefing for the punitive damage issues, no one says this  
16 is only related to ignition switch cars.

17 So I'd like to now just switch to the complaints  
18 because Your Honor asked legitimate questions about what are  
19 you asserting as an independent claim. And I can, Your Honor,  
20 give you five minutes as to why -- what an independent claim  
21 meets in accordance with Judge Gerber's decisions. I'll pass  
22 on that unless you really want, but because I think there's a  
23 much simpler answer. In Chapman, the independent claims that  
24 they are asserting are buried in their negligent Count 2.

25 THE COURT: Chapman and Tibbetts just don't pass



1 muster. I mean, it just --

2 MR. STEINBERG: Okay.

3 THE COURT: It doesn't, but they don't.

4 MR. STEINBERG: Fox, which is the only other one, the  
5 only paragraph that Mr. Butler didn't read to you is the first  
6 paragraph, 48, of the newest Fox complaint, which says:

7 "Plaintiff incorporates as if we alleged herein in  
8 full paragraphs 1 through 47 of this complaint."

9 So he basically re-alleged everything else there.

10 I will say that if you take one step back and realize  
11 what has happened here, is that because we told him that he  
12 didn't break out what was the independent claim for New GM, he  
13 decided I'm going to put it in a separate count and I'll keep  
14 the Old GM count as a separate count. And that's what he did,  
15 but it obviously makes no sense because, first of all, as Your  
16 Honor had ruled in Schnolt (phonetic), he's still stayed from  
17 suing Old GM to Old GM he put as a separate count but is not a  
18 named as a defendant in the lawsuit itself. So in trying to  
19 create what he thought was a clever solution, he created much  
20 more problems for himself.

21 And Judge Gerber ruled that if you didn't do it right  
22 in your allegations, it was really allegations, he said your  
23 actions are stayed. So the extent that Fox hadn't been doing  
24 it right up until the last time that they amended and now  
25 they've amended in a different way that creates problems and



1 Tibbetts and Chapman still have major problems in how they've  
2 had their allegations, they were stayed. The burden really  
3 wasn't on me to tell them to comply with their orders. They  
4 should know how to comply with an order. The burden is on me  
5 to come to Your Honor if I need you to enforce it because they  
6 aren't complying with the order. And that's what we're doing  
7 now.

8 THE COURT: Well, just so it's crystal clear, Chapman  
9 and Tibbetts don't comply with the prior orders of the court  
10 and they remain stayed. That's as simple as that.

11 With respect to Fox, I'm taking it under advisement.  
12 We're going to have a hearing on July 18th. I will hear more  
13 arguments then.

14 Mr. Butler, I said this -- I'm not hiding the ball on  
15 this, if -- you know, I don't force anybody to resolve things  
16 by settlement or agreement. I got competing letters saying  
17 negotiations are going on. All I can say is, if you really  
18 think you're going to go to trial in September, you ought to  
19 seriously try and resolve the issue as to whether you can drop  
20 this supposed independent claim. Whether you believe you need  
21 it or not is up to you. I'm not telling you what to do, but I  
22 think, sure, I mean, the Second Circuit could hand down a  
23 ruling tomorrow. I wouldn't bet on it. And I'm going to hear  
24 more argument on July 18th and the arguments may further  
25 elucidate the issues that have been raised today.



1 I'm going to go back and reread a lot of things, but  
2 you've got an impending trial date and I'm sure you've got  
3 things to do. And I see you waived a jury and -- you know, and  
4 I assume the judge is ready to go to trial in September. If  
5 you think you can resolve issues with Mr. Steinberg or other GM  
6 counsel so as to -- you've already resolved the punitive damage  
7 issue, it sounds like. If you can resolve the independent  
8 claim issue, you'll submit a stipulation, and it'll be  
9 resolved, and god speed in trial. I don't know what to say  
10 other than that.

11 MR. BUTLER: Your Honor, we appreciate that. We  
12 understand. On the morning of September 13, Count III of our  
13 second recast and amended complaint is going to be stayed or  
14 not. And --

15 THE COURT: I'm -- you know, your whole case --

16 MR. BUTLER: -- the trial will --

17 THE COURT: -- may be stayed. Don't -- I'm not sure  
18 what part of the order is going to be, but don't assume you're  
19 going to trial on everything other than one count. That's not  
20 for me to decide today. Just don't assume anything other than,  
21 you know, the stay --

22 MR. BUTLER: Your Honor --

23 THE COURT: There is a stay. Okay?

24 MR. BUTLER: I want to point out that they're --

25 THE COURT: Stop. There's a stay in place. That's





1 unquestionable. GM is seeking to enforce the injunction.  
2 Okay? You and Mr. Weintraub argued why it shouldn't be  
3 enforced and in due course I will decide that. It may not be  
4 until after the Second Circuit decides, but what the state  
5 court judge decides to do -- if there's a stay in place, the  
6 state court judge can do what he or she thinks is appropriate.

7 But, Mr. Steinberg, go ahead.

8 MR. STEINBERG: Right, Your Honor, you --

9 THE COURT: Mr. Butler, I'll give you a chance in a  
10 second.

11 Go ahead, Mr. Steinberg.

12 MR. STEINBERG: Your Honor, you've already indicated  
13 what you're going to do on Chapman and Tibbetts and that you're  
14 going to reserve on Fox until I have another opportunity to  
15 speak, presumably in addition, on these same issues. So I have  
16 one final comment to make recognizing that I will have another  
17 time to expand further to the extent that I think necessary.  
18 But --

19 THE COURT: You may not have another chance to expand  
20 on Fox. Don't --

21 MR. STEINBERG: Well, I mean, Fox, yeah. Okay.

22 THE COURT: Okay.

23 MR. STEINBERG: Then on Fox. I think the other thing  
24 that I would say on Fox is that they are asserting an assumed  
25 liability. Old GM sold their vehicle before the sale. The



1 sale order specifically defined what were the assumed  
2 liabilities. They are the glove box warranty to do a repair,  
3 which is not -- the lemon law, which is not an assumed product  
4 liabilities, which an independent claim is not. By definition,  
5 independent claims can't be an assumed product liability. Duty  
6 to warn is given to a manufacturer or a seller. We're not he  
7 manufacturer, New GM. We're not the seller, as vis-a-vis an  
8 independent claim, and we're not the successor in interest  
9 because we have a no successor liability finding.

10           They're asserting, like Chapman and Tibbetts without  
11 using the Chapman and Tibbetts words, is that since Old GM had  
12 a duty warn, that we had a continuing duty to warn. But our  
13 duty was on an assumed product liability. They can assert duty  
14 to warn as a separate element of a cause of action to establish  
15 the assumed product liability. That doesn't get them to assert  
16 this as an independent claim. They have not asserted anything  
17 in their complaint that identifies anything other than since  
18 Old GM didn't warn, New GM also didn't warn. There wasn't any  
19 volitional conduct that was alleged --

20           THE COURT: Mr. Steinberg, go talk to Mr. Butler. If  
21 you -- either you work it out or you won't work it out. What  
22 can I say?

23           MR. STEINBERG: Okay.

24           THE COURT: I'm taking -- we're going to hear  
25 argument on July 18th.



1 MR. STEINBERG: Okay.

2 THE COURT: Mr. Butler, go ahead, briefly. We've got  
3 to end.

4 MR. BUTLER: Your Honor, yes, very briefly. For the  
5 record, GM has not moved to enforce a stay except as to  
6 Count III, the failure to warn claim versus New GM. There's  
7 nothing before the Court except that. That complaint by GM,  
8 contrary to Mr. Steinberg's arguments about the September 2015  
9 letter not received until September 8, that complaint about  
10 failure to warn versus New GM based upon New GM's post-  
11 bankruptcy conduct was never mentioned by King & Spaulding or  
12 New GM until May 16, 2016.

13 And Mr. Steinberg's statement that our claim against  
14 New GM, but for failure to warn, is, quote, "since Old GM had a  
15 duty to warn, then New GM had a continuing duty to warn."  
16 That's not correct, as our second recast and amended complaint  
17 shows, and the first recast and amended complaint showed.  
18 Thank you, Your Honor.

19 THE COURT: Thanks, Mr. Butler.

20 No, no more. No more. No more. No, we're recessed.

21 MR. STEINBERG: Thank you, Your Honor.

22 MR. WEINTRAUB: Thank you, Your Honor.

23 (Proceedings concluded at 1:15 p.m.)


24 \* \* \* \* \*

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C E R T I F I C A T I O N

I, Lisa Luciano, court-approved transcriber, hereby  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
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LISA LUCIANO, AAERT NO. 327

DATE: June 28, 2016

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I, ILENE WATSON, court approved transcriber, certify  
that the foregoing is a correct transcript from the official  
electronic sound recording of the proceedings in the above-  
entitled matter.



ILENE WATSON, AAERT NO. 447

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